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# Contracting Blame

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## CONTRACTING BLAME

Eric A. Zacks \*

*This Article explores the impact of the cognitive biases of judges and juries in the context of contract preparation and execution. From rental car contracts to mortgage forbearance agreements, contract preparers include provisions and formatting characteristics that appear to add little to the material terms or understanding of the agreement. These features, however, make perfect sense if one considers the implications of attribution theory, which is based on our tendency to attribute blame for an event to another's disposition or personality. We are predisposed to blame the victim, which makes us susceptible to misjudgment when examining another's actions. This Article makes a novel link between behavioral literature and contract preparation and suggests that contract preparers may be able to manipulate adjudicators' cognitive biases systematically. Exclusive of the economic bargain, contract provisions can provide attributional "clues" about the contracting context that inform and reassure judicial interpreters that a particular contracting party is more blameworthy than another. For example, multiple signature blocks, boldfaced or highlighted warnings, and recitals depicting a particular version of events all reinforce our tendency to perceive the contracting party as being able to act freely without being influenced by his or her situation. In counterproductive fashion, however, these features are often irrelevant to a party's decisions in the contracting context. In light of the significant implications of the existence and prospective use of such attributional clues for contract law theory and judgment, this Article proposes a broader contextual and adjudicative focus when contemplating contract law reforms.*

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*“What happened, it seems to me, is that of all the indicia which determine whether a thing is a contract or not, the most irrelevant—the physical appearance of the thing as a thing—turned out to be the most powerful.”*

—Arthur Allen Leff<sup>1</sup>

*“The secret of life is honesty and fair dealing. If you can fake that, you’ve got it made.”*

—Groucho Marx<sup>2</sup>

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1. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970).

2. N.C. MUNSON, IF YOU CAN KEEP IT 154 (2008).

## INTRODUCTION

BY READING THIS SENTENCE, WHICH IS WRITTEN IN ALL CAPITAL LETTERS, YOU AGREE THAT YOU HAVE VOLUNTARILY READ AND UNDERSTOOD THIS ENTIRE ARTICLE, INCLUDING ALL 188 FOOTNOTES. Is the previous sentence true? It is difficult to see how it would be simply by virtue of its existence on the page. Either you will voluntarily read and understand this entire Article or you will not, and the inclusion of the first sentence does not, in circular fashion, make it true. As a practical matter, no one reads all warnings in uppercase type or, as a more modern example, reads every line on every page before clicking to the next on his or her electronic book reader. Nevertheless, contract preparers believe that adjudicators are affected by the presence of contract formatting features and contextual indicators, and an examination of behavioral literature indicates that they may be on to something.

This Article explores the impact of the cognitive biases of judges and juries in the particularly unique context of contract preparation and execution. From rental car contracts to mortgage forbearance agreements, contract preparers include provisions and formatting characteristics that appear to add little to the material terms or understanding of the agreement. These features, however, make perfect sense if one considers the implications of attribution theory, which is based on our predisposition to attribute blame for an event upon another's disposition or personality. We tend to blame the victim, for example, which makes us susceptible to misjudgment when examining another's actions. This Article makes a novel link between behavioral literature and contract preparation and suggests that contract preparers may be able to manipulate adjudicators' cognitive biases systematically. Exclusive of the economic bargain, contract provisions can provide attributional "clues" that inform and reassure judicial interpreters that a particular contracting party is more blameworthy than another. The contract, in other words, can depict a particular contracting context, which can affect our judgment as to the blameworthiness of the parties.

For example, multiple signature blocks, boldfaced or highlighted warnings, and recitals describing a particular version of events all reinforce our tendency to perceive the contracting party as being able to act freely, uninfluenced by his or her situation. In counterproductive fashion, however, these provisions or features are often irrelevant to a party's decision in the contracting context. Behavioral research shows, for example, that contract warnings or disclosures are largely ignored by

contracting parties. The number of signature blocks in a rental car contract similarly is irrelevant to the decisions made in the contracting context in which the renter finds himself. Nevertheless, many contracts appear to reflect an awareness, conscious or not, that judicial scrutiny of the contracts will be largely based on an *ex post* attribution analysis—however flawed—of the contracting context. More problematically, certain contract law reforms support or, in some instances, mandate such features.

Regardless of whether one believes that different situations impact our contracting behavior, we should resist attempts by a powerful party to falsely represent the contracting context. Thus, because certain contractual features appear to contemplate *ex post* review and the presentation of a particular contracting context, we need more complete and nuanced reactions and responses to such features. As with the differing explanations for behavior, our responses can be compared and contrasted with one another based on the differing underlying beliefs in the power of the contracting environment. We thus blame the signer of a contract with respect to all contracting decisions, even though the signer may be contracting under a number of powerful situational influences. We have a tendency to blame the victim in retrospect, and the contract preparers “assist” us in doing so by presenting contracts that reinforce the other party’s blameworthiness.

Section I of this Article provides an introduction to attribution theory and its applicability to decision-making issues for both executive actors (actors who are making decisions for themselves, such as contract signers) and adjudicative actors (actors who are assessing the decisions made by themselves or someone else, such as judges and juries). Section II critically analyzes how an understanding of attribution theory can be utilized by contract preparers on an *ex ante* basis to obtain particular results under contract law. Section III of this Article addresses possible responses to this critique. In Section IV, I suggest some possible implications of, and suggestions for, a more nuanced understanding of attribution theory’s role in contract law. The last Section of this Article concludes that if a more complete understanding of the contract context and its manipulability (both for executive actors and adjudicative actors) is not achieved, the effectiveness of contract law reforms may be significantly diminished.

## I. ADJUDICATION AND SITUATIONAL DECISION-MAKING

### A. *Explaining Bad Outcomes*

The fundamental attribution error, or correspondence bias, describes the error individuals make when determining the cause of behavior, both

their own and that of others.<sup>3</sup> As outsiders examining others' choices, we tend to conclude that the cause of the others' choices and resulting negative outcomes were internal and intrinsic to the other person, while we generally attribute negative events that happen to us to situational and other influences external to ourselves.<sup>4</sup> We generally believe, in other words, that bad results arise from bad people and we ignore or are oblivious to mitigating situational factors.<sup>5</sup> We also are "too slow to revise our

3. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 4 (1991) (describing the fundamental attribution error as "[p]eople's inflated belief in the importance of personality traits and dispositions, together with their failure to recognize the importance of situational factors in affecting behavior"); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 127 (1995) ("[T]he 'fundamental attribution error' [is] the tendency inappropriately to attribute the behavior of another person to her corresponding dispositions or traits (i.e., 'the sort of person she is') rather than to the circumstances in which she finds herself, including role demands.") (citing Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 135-40 (Daniel Kahneman et al. eds., 1982)); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 738 (1998) (noting that the error "causes human decision-makers to attribute too much importance to dispositions, and to overlook situational influences"); David C. Funder, *Errors and Mistakes: Evaluating the Accuracy of Social Judgment*, 101 PSYCHOL. BULL. 75, 78 (1987) ("This error is the putative tendency for people to overestimate the influence of attitudes and personality on behavior, and to underestimate the power of the situation. It is typically demonstrated by experiments that show how subjects will draw inferences about the personalities of rating targets on the basis of insufficient information.") (citation omitted).

4. Feigenson, *supra* note 3, at 86 ("People tend to attribute other people's behavior and its (negative) consequences to those people's enduring dispositions or traits, while attributing their own behavior and its (negative) consequences to the circumstances. In other words, 'I acted as I did because anyone in that situation would have behaved similarly; but he acted as he did because he is that kind of guy.'"); Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 21 (1995) ("When people observe behavior, they often conclude that the person who performed the behavior was predisposed to do so—that the person's behavior corresponds to the person's unique dispositions—and they draw such conclusions even when a logical analysis suggests they should not."); Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 402-03 (2003) ("Attribution theory has many facets, but of immediate concern to us are jurors' tendencies (a) to assume that bad results are caused by people's actions, and (b) to attribute causation on the basis of the parties' perceived personal dispositions.") (citation omitted).

5. Prentice, *supra* note 4, at 404 ("Personal factors tend to drift to the fore, whereas situational factors tend to fade into the background."); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1444 (1983) (explaining one example of the fundamental error is "to attribute an honest act to an honest disposition rather than to the presence of factors that encourage honesty such as the monitoring of behavior or the need for the approval of others"); Gilbert & Malone, *supra* note 4, at 22 ("[W]hen people do precisely what the physical environment or the social situation demands, dispositional

hypotheses in response to new evidence, too confident in the correctness of our judgments in many settings, and too quick to lose faith in genuinely diagnostic evidence when that evidence is embedded among irrelevant or distractor variables.”<sup>6</sup>

Thus, with respect to assessing contract choices and contract outcomes, judges and juries are inclined to blame the contracting “victim” and that person’s disposition for the poor choice or outcome rather than any situational influences.<sup>7</sup> This is particularly instructive in the consumer contract context. For example, very few persons read consumer contracts such as rental car agreements, even though those contracts often contain unfavorable clauses one may resist if known.<sup>8</sup> The renter’s behavior in that situation is subject to many interpretations, ranging from those citing the renter as an irrational actor who can be manipulated to others believing the renter is a rationally ignorant actor who logically chooses not to read the contract.<sup>9</sup> For purposes of this Article, however, the focus primarily is on

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inferences are logically unwarranted. This simple rule is eminently reasonable, but, as with the interstate speed limit, someone seems to have neglected to tell the drivers.”).

6. Philip E. Tetlock, *An Alternative Metaphor in the Study of Judgment and Choice: People as Politicians*, 1 THEORY & PSYCHOL. 451, 453 (1991) (citations omitted).

7. Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOLOGY 569, 569 (1998) (“We are ingenious in ‘discovering’ the defect of character we believe would account for a person’s misfortune.”) (quoting Antoine Arnauld, *THE ART OF THINKING: PORT-ROYAL LOGIC* 285 (1964)); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 333 (2003) (noting that “people systematically—and often quite erroneously—attribute causation, responsibility, and blame to the most visible actors in a given situation,” which is compounded by mistakenly “assuming that action is attributable to disposition, rather than situation.”); Tetlock, *supra* note 6, at 464 (“People prefer dispositional explanations because such explanations typically come first to mind, and people rarely consider less obvious situational ones.”).

8. Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1269 (1993) (“It is no secret that consumers neither read nor understand standard form contracts.”); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469 (2008) (“People who sign standard form contracts rarely read them.”) (citations omitted).

9. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (“Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren’t subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms.”); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 601 (1990) (“Thus, the benefit to be derived from acquiring adequate knowledge of contract terms is usually low and is likely to be far exceeded by the significant costs of

how the adjudicators, rather than the actors themselves, may react to a “bad” or apparently unfair contractual outcome. Attribution theory suggests that we may tend to blame a poor contractual outcome on the actor herself rather than the contract process or situation, or more fundamentally, that the contract process or situation may be ignored or deemed irrelevant when deciding whom to “blame.”<sup>10</sup>

Further, knowledge of adjudicators’ fundamental attribution error encourages contract preparers to construct contracts that will take advantage of the error.<sup>11</sup> Just as sellers of products and services “will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits,” we should expect sellers to respond to the same market incentives to prepare contracts to manipulate *ex post* reaction and increase profits.<sup>12</sup> Thus, our *ex post* judgment heuristics lead to a trilogy of problems, namely, that such heuristics result in biases and errors, the adjudicative actors (judges or juries) are likely to be unable to recognize their own biases and errors, and such heuristics, being susceptible to bias and error, can and will result in the manipulation of their reactions to the contractual situation.<sup>13</sup>

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acquiring that information. It is, therefore, rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms.”); Prentice, *supra* note 4, at 359–60 (discussing the information costs involved with reading and understanding all contracts, which suggests that it may in certain instances be irrational to attempt to become completely informed).

10. Hanson & Yosifon, *supra* note 7, at 333 (noting that “[j]udges, juries, and legislators are as vulnerable to these cognitive biases as anyone else”); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 135 (2004) (suggesting that “judicial attributions will be far too dispositionist . . . . Where harms are caused by situational influences, the law will tend either to seek out and name a dispositional scapegoat on which to place responsibility, or to deny that there was a harm (perhaps by derogating the victim) or the possibility of a legal remedy.”) (citation omitted).

11. It has been suggested that, because of dispositionism, “by promoting a lopsided worldview, based on individual stable preferences and autonomous individual choices, corporations can actually curtail individual autonomy and alter perceived preferences.” Hanson & Yosifon, *supra* note 7, at 229. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (describing the manipulation of consumer behavior biases by companies to lower consumer perception of product risks). This Article suggests that not only are consumers and other contracting parties manipulated, but that adjudicators can be and likely are as well.

12. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 743 (1999).

13. Hanson & Yosifon, *supra* note 10, at 39–40; see also Tetlock, *supra* note 6, at 453 (noting that “[p]eople, it is widely agreed, are limited-capacity information processors who rely on inferential shortcuts to help them make sense of an otherwise impossibly complex environment and to make otherwise hopelessly difficult decisions. . . . The price of cognitive



### B. *Situational Decision-Making*

If we return to the typical rental car scenario as an example of a contracting situation, imagine that the renter is presented with a form contract by the rental car agent. The renter is perhaps a traveler who has just arrived in the airport or city where the rental agency is located. Other customers were just served ahead of the renter, resulting in the renter having to wait before being assisted by the rental car service agent. Other customers also are in line waiting behind the renter to meet with the rental car agent and appear to be impatient. The rental car agent does not have, or appear to have, the authority to modify the contract if the renter were to question or propose a change to a provision.<sup>14</sup> The rental car agent then highlights or marks where the renter is required to sign or initial the rental car contract, with little or very basic explanation. The renter had never seen a customer negotiate or attempt to negotiate changes to the rental car contract. The customer thus signs the contract as and where instructed after, at most, confirming the rental rate, rental term, and insurance choice.

All of the above contracting behavior can be accounted for through behavioral theories that examine the processes and heuristics used by individuals when making decisions. For example, the status quo bias provides one reason that the renter may accept the form contract as presented. The status quo bias describes the tendency of individuals to prefer the status quo (the contract as presented) even if the status quo does not efficiently allocate rights—in this case, through the inclusion of contractual terms that do not necessarily reflect what the parties would have agreed to had they negotiated them exhaustively.<sup>15</sup> In addition, the

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economy, in this view, is increased susceptibility to error and bias.”).

14. Meyerson, *supra* note 8, at 1270 (“Additionally, because consume[rs] know that the agent behind the counter is not authorized to rewrite the contract, they conclude that there is little to be gained from reading a non-negotiable contract.”) (citation omitted); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1225 (1983) (“Customers know well enough that they cannot alter any individual firm’s standard document. . . . If they do not [understand the take-it-or-leave-it nature of the agreement], and if they attempt to bargain the form terms, the salesman will explain his lack of authority to vary the form.”); *see also* Prentice, *supra* note 4, at 372–73 (explaining the appearance of a lack of authority to bargain and further expecting that most “form takers . . . would likely give up after being told that the agent had no authority to alter [the form documents], that the forms came from the lawyers and could not be changed, or that an exception could not be made just for this particular [form taker].”) (citation omitted).

15. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1584 (1998)) (“[T]he ‘endowment effect,’ . . . suggests that the initial allocation of legal entitlements can affect preferences for those entitlements. The consequence is that completely alienable legal entitlements will be ‘sticky’—that is, [t]e[n]d not to be traded—

contract's preprinted nature and official and legal appearance increases the likelihood the renter will defer to it as written.<sup>16</sup> Similarly, individuals often rely on social proof when acting in particular situations.<sup>17</sup> Thus, if no one reads rental car contracts, or, at least, if one perceives that no one else reads such contracts, as may be perceived by the renter while waiting in line at the rental car center, then one is unlikely to challenge the community consensus on the contracting process.<sup>18</sup> The unknown and potentially high costs and uncertain benefits of negotiating and seeking alternative arrangements also deter negotiation, particularly with respect to terms that may not have been addressed in the rental car reservation (such as terms other than car type, rental price and rental period).<sup>19</sup> Our preference to end up in a worse situation through inaction (accepting the contract as written) rather than through action (negotiating or seeking alternative arrangements) also explains an individual's inclination to accept the rental contract as presented.<sup>20</sup> A renter's optimism bias, which is the tendency of an individual to underestimate the risks involved with a particular activity in which the individual is engaged, may also lead the renter to believe that nothing "bad" is likely to happen during the rental period and forego negotiating any particular contingent or unfavorable contractual terms.<sup>21</sup>

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even when such stickiness cannot be explained by transaction costs."); Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 26 (2006) ("Status quo bias exists when decision makers choose to remain with the status quo more often than traditional economic theory would suggest.") (citation omitted).

16. Prentice, *supra* note 4, at 372.

17. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION-MAKING* 201–02 (1993) (describing conformity effects).

18. *Id.* at 200–04 (describing an experiment where people were influenced in their conclusions based on the answers given by their co-participants). Plous explains that "most people rendered at least some judgments that contradicted the evidence of their senses, and many conformed on the majority of trials." *Id.* at 201; *see also* Prentice, *supra* note 4, at 373 (discussing how social proof suggests a reason that people will not challenge broker form contracts as presented to them).

19. Meyerson, *supra* note 9, at 600.

20. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211, 1224 (2003) (describing "the tendency to care much more about errors of commission than about errors of omission, even when there is no obvious normative reason to draw a distinction.") (citation omitted).

21. Prentice, *supra* note 4, at 362. Interestingly, when a poor outcome occurs, our optimism bias may be replaced with self-blame in the presence of a contract, even when the contract's terms (such as an exculpatory clause) may not be enforceable. *See* Tess Wilkinson-Ryan & Jonathon Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 410 (2009) (explaining that exculpatory language in contracts, even if legally unenforceable, has a deterrent effect on the likelihood that a party will seek compensation).

### C. Ignoring the Situation When Adjudicating

Contract law has largely ignored the “situation” of contracting. Theories of contract law traditionally were premised on the idea of an individual’s autonomy. Without the ability to act freely on one’s behalf, it would not appear logical or equitable to hold one accountable for his or her contracting behavior. This is because autonomy “provides the very basis of moral authority for the principle of contractual obligation.”<sup>22</sup> Our wills, however, only yield to the most “salient kinds of situations, and not necessarily the most powerful,” such as physically compelled assent or improper physical threats that would constitute duress.<sup>23</sup> In other words, we may only recognize the power of the “situation” where the threatening situation was “not only extremely conspicuous, but where the element of choice was also clear.”<sup>24</sup>

By focusing on a situation where the power of the situation is undisputed and the lack of choice is clear, we may be unable or unwilling to imagine less extreme situations that have similar effects, or more plainly, that the situation *always* is important to decisions and the existence of choice.<sup>25</sup> The starting and ending point of dispositionism can result in an “abdication of any realistic inquiry into the basic forces shaping our own behavior beyond what common sense and our intuitions will provide,” suggesting that the inquiry is unlikely to arise in a contract situation, particularly one in which the written contract provides the dispositional “clues” that the adjudicator expects and probably desires.<sup>26</sup>

As seen in Section B above, a number of situational influences can explain why the rental car customer made the promises in, or consented to the terms of, the rental car contract as presented. What is noteworthy at this point, however, is that these situational influences are likely ignored by *ex post* adjudicators engaged in the process of assigning blame for a poor contractual outcome, which in turn impacts legal conclusions regarding the contract’s effect.<sup>27</sup> There are several behavioral biases that contribute to

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22. Hanson & Yosifon, *supra* note 7, at 288.

23. *Id.* at 289.

24. *Id.* at 290.

25. *Id.* at 290–91 (“This dispositionism blinds the [promise] theory to the enormous power of the situation. It ignores the fact that situation shapes the very thoughts and behavior that manifest as the choices Fried crowns with a dispositionist presumption.”).

26. *Id.* at 292 (citation omitted).

27. See Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 576 (1999) (observing that “[t]he classical ideal of ‘freedom of contract’ depends entirely on an obviously unrealistic model of contract formation where all transactions are negotiated by sophisticated, fully-informed parties of equal bargaining power, capable of protecting their

the tendency to blame others' internal or intrinsic nature rather than examining situational influences.<sup>28</sup>

Consequently, we attribute the renter's poor contractual outcome to her intelligence, hastiness, or other personality factor, in particular if the contract succeeds in portraying the contracting context as being free of situational pressures.<sup>29</sup> Indeed, our "assumption of rationality also allows the judge or observer to marginalize the behavior of victims who act foolishly, condemning them to their deserved fate."<sup>30</sup>

Moreover, how the act is presented to us is particularly important to how we determine its cause.<sup>31</sup> If, as the result of framing, the execution of the contract is perceived to be the "deviant" act, then we should expect an *ex post* attribution of blame to the party who executed the contract (and who may be complaining of situational pressures and a lack of consent).<sup>32</sup> Most importantly, we will not question our dispositionist belief that the renter had significant influence over the contract, including its terms, negotiation and execution.<sup>33</sup> Section II *infra* will explore in more depth the

self interests and of arriving at mutually beneficial agreements that will maximize utility for both parties. . . . Unfortunately, this model and its underlying assumptions do not reflect reality.") (citation omitted).

28. These biases arise from the way in which we process information and make judgments, which psychology suggests is based on the use of knowledge structures and judgmental heuristics. Feigenson, *supra* note 3, at 87–88. Knowledge structures provide reference points so that new information can be classified and easily understood, while judgmental heuristics assist a person in filling "gaps" in information, so that the information provided can be used to make a judgment or classification. *Id.* at 87–90.

29. Feigenson, *supra* note 3, at 127; Gilbert & Malone, *supra* note 4, at 25 ("[O]nly when people observe behavior that is more extreme than the situation leads them to expect do they make dispositional inferences about the actor.").

30. Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 699 n.213 (1996).

31. Hanson & Yosifon, *supra* note 10, at 42, 43 (noting that "the way in which an issue is presented to us significantly influences how we perceive it. . . . '[F]raming' is one identified piece of the manipulable situation."). Of course, this same presentation affects contracting parties' perceptions as well, which suggests that our reaction to a contract can be influenced, for example, if the agent presents it to us with an oral statement that "this is just boilerplate" (or, conversely, "this is important"). See Prentice, *supra* note 4, at 377 n.218 (noting that our risk perception can be lowered based on presentation or framing).

32. Gilbert & Malone, *supra* note 4, at 25.

33. Hanson & Yosifon, *supra* note 10, at 9 ("[E]conomists in general and legal economists in particular have indeed applied dispositionist assumptions *unflinchingly*—that is, without the self-suspicion and rigorous inspection that social science would demand. . . . because their dispositionist assumptions seem so intuitively plausible, and so fundamental to our sense of ourselves, that they are beyond question." ). Similarly, we may not question the continued contractual presentation of the contract's context to the extent it reinforces our pre-existing beliefs regarding the free choice being made in almost every instance. For

extent to which this dispositionist belief can be reinforced by the terms of the written contract itself.<sup>34</sup> As with other judgments and attributions of blame, this Article asserts that judgments regarding contracting context can be manipulated by including in advance contractual provisions designed to serve such purposes.<sup>35</sup>

## II. PROSPECTIVE ATTRIBUTIONAL CONTRACTING: ARE ADJUDICATORS BEING MANIPULATED?

If ordinary situational factors matter for decision-making purposes but are irrelevant or downplayed for adjudication purposes, then the powerful party within the contracting context has a number of options. First, on an *ex ante* basis, the powerful party will be able to create a fairly oppressive contract bargaining environment without fear of repercussion. We should expect repeat consumer contract transactions to occur within a framework that provides very little opportunity for negotiation. Indeed, with respect to mortgage, credit card, and other consumer transactions, contracts are provided within a context where it is unlikely that provisions will be read or resisted.<sup>36</sup> Companies may in fact be required to prepare contracts in

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example, in the website contract context, Woodrow Hartzog has argued that courts routinely ignore website design and features and limit their review to the boilerplate terms, even though website design and features “are capable of conveying a promise of privacy and inducing user reliance” and may contain “elements that can interfere with contract formation.” Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1670 (2011).

34. In other contexts, it has been noted that dispositionist beliefs influence our reaction to accidents outside the contract context. For example, in the famous McDonald’s coffee burn case, many people were inclined to blame the victim as being responsible for the burns. It was only after a review of the context of the burn, such as McDonald’s corporate policy regarding previous coffee temperature complaints and the actual temperature of the coffee, that jurors determined that McDonald’s also was responsible for the accident. See Hanson & Yosifon, *supra* note 7, at 335 n.714.

35. Hanson & Yosifon, *supra* note 10, at 67 (noting that “[w]hether we perceive a person to be in ‘control’ or to have acted ‘intentionally’ are matters that can be framed and promoted”). This effect may even be exaggerated in those instances where the adjudicator has a wider range of remedies and more flexibility in adjudicative procedure, such as is sometimes the case in arbitration.

36. See generally Duncan MacDonald, *The Story of a Famous Promissory Note*, 10 SCRIBES J. LEGAL WRITING 79, 89 (2006) (“Disclosure overload has made plain language an impossible exercise. In the name of consumer protection, government has erected a regime guaranteeing that consumers will never read bank documents, except through the expensive eyes of a lawyer.”); Prentice, *supra* at note 4, at 358–60 (discussing the situational and other reasons that investors do not typically read prospectuses or other investment agreements); Eric A. Zacks, *Unstacking the Deck? Contract Manipulation and Credit Card Accountability*, 78 U. CIN. L. REV. 1471, 1474–76 (2010) (discussing the context that results in most consumers not reading credit card agreements). But see Warkentine, *supra* note 8,

such a manner in order to remain competitive in the marketplace.<sup>37</sup>

More importantly for this Article, the powerful party can create a contract that reinforces the adjudicators' behavioral biases and dispositionist beliefs. That is, although it may have been executed in a relatively inflexible contracting context, the contract itself can create the appearance of a flexible context. It is logical for contract preparers to respond to the behavioral biases of adjudicators, just as they may be expected to respond to court rulings with respect to the preparation of contracts.<sup>38</sup> As with the inclusion of oppressive terms, they may be required by the marketplace to do so.<sup>39</sup> With the increasing understanding of adjudicators' behavior, not to mention the marketing expertise of sophisticated corporate actors, we should expect contractual features that reinforce the adjudicators' anchoring beliefs that (i) the victim is responsible in the present situation in which the parties find themselves (e.g., whether for the damages suffered or other liabilities or obligations under the contract), and (ii) there were no manipulating situational factors that should impact the belief under (i).<sup>40</sup> The contract may present to the adjudicator "the ingredients of autonomous, volitional, preference-satisfying disposition," which would suggest victim sophistication and culpability.<sup>41</sup> Moreover, we should expect contractual features that cause

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at 545 (describing the Washington legal requirement that any contractual exclusion of remedies has to be specifically negotiated in certain situations).

37. See Hanson & Kysar, *supra* note 12, at 747 (reasoning that "[i]ndeed, flipping Friedman's classic justification of the rational actor model, one might say that the evolutionary forces of the market will force the parties in the dominant position to behave 'as if' they know and understand how best to use the teachings of the behavioral literature to manipulate other actors for gain. . . . Manufacturers, to survive, *must* behave 'as if' they are attempting to manipulate consumer risk perceptions. And in light of the immense power of the market forces driving these attempts, it seems highly doubtful that manufacturer strategies (be they deliberate or accidental) will fail.") (emphasis added).

38. Meyerson, *supra* note 9, at 622 (noting how court decisions are "available to guide future contracting parties and reduce contract transaction costs.") (citation omitted).

39. Hanson & Kysar, *supra* note 12, at 747; see also Hanson & Kysar, *supra* note 11, at 1422 (suggesting that particular pricing practices, designed to manipulate consumer purchasing, illustrate "the potential of manipulative manufacturer tactics to outpace the understanding of behavioral researchers. . .").

40. Hanson & Yosifon, *supra* note 7, at 246 (noting the widespread corporate practice of presenting the consumer as "nobody's fool"). In the consumer product context, "an important reason that sellers might embrace and encourage dispositionism is their hope of shifting responsibility and avoiding costly regulation or liability." *Id.* at 248.

41. *Id.* It has been noted that "[i]n the new formalism, sophisticated parties are held to a different set of rules, grounded in freedom of contract." Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 495 (2010) (citation omitted). The "new formalism" is evidenced by the reliance of the bargain principle, the reluctance of courts to interfere with the substance of the parties' contract and the prominence of literalism. *Id.* at 500. Miller, however, suggests that courts do not

the contracting victim to believe that the victim is responsible for an undesirable outcome or event.

Finally, the behavioral biases described above are mixed with the pervasive norm of contract as moral promise.<sup>42</sup> Viewing the voluntary contract as a moral social convention helps explain why people also are likely to judge those who breach contracts harshly.<sup>43</sup> To the extent that an adjudicator, particularly a public adjudicator, believes that the contract's execution or breach is a moral issue, the adjudicator should "be more motivated to hold others responsible and to reject situational explanations or excuses."<sup>44</sup> Thus, people tend to judge others more harshly based on the "moral culpability" in a particular contract situation.<sup>45</sup> Again, framing a

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engage in a "serious attempt" to explain who is sophisticated. *Id.* at 518. If this is true, then contract preparers may be able to manipulate these weak attempts through a particular contractual presentation of party sophistication. *See id.* at 529–35 (describing and advocating a preferred "principled and reflective approach" to ascertaining party sophistication).

42. Wilkinson-Ryan & Baron, *supra* note 21, at 405, 406 (noting how "[m]ost people agree that breaking a promise is immoral," and demonstrating that "people are quite sensitive to the moral dimensions of a breach of contract."). It should be noted at this point that this Article primarily focuses on the contractual presentation of consent and contracting context issues rather than the contractual presentation of particular "deal" terms (such as price or the contract subject matter). There is not a bright line, admittedly, between terms that may be deemed "material" to the transaction and may be considered "deal" points and those that are purely "contextual" in nature. In addition, the same behavioral critique of contractual context presentation presented in this Article can be extended to deal term presentation as well. For purposes of this Article, however, I have chosen to focus on the former because it provides perhaps the clearest example of *ex ante* manipulation of *ex post* adjudicative biases; that is, while the presentation of "deal" terms is important for both contracting and adjudicative parties, the presentation of contracting context is important only for adjudicative parties (the party that did not prepare the contract usually does not have a "stake" in how consent or the contracting context is presented). Certainly, we should be concerned about the manipulation of judicial interpretation of "deal" terms or terms that may directly relate to or influence damage calculations. I am thankful for Meredith Miller's helpful comments regarding how to think about this cloudy distinction.

43. Tetlock, *supra* note 6, at 469 (noting how "people are not only expected to act in accord with prevailing norms, they also are expected to censure those who violate norms") (citation omitted); Wilkinson-Ryan & Baron, *supra* note 21, at 409 (predicting that "people hold such strong beliefs about the moral rules of promise and contract that they will use these rules to inform their legal decision making").

44. Tetlock, *supra* note 6, at 469; *see also* Wilkinson-Ryan & Baron, *supra* note 21, at 423 (discussing the impact of the moral element of contract upon outside observers, who in the context of the authors' experiment, "thought that the parties were morally bound by the specific language of the contract, even when contract law says that the exculpatory clause is unenforceable or that the promisor can pay rather than perform.").

45. Wilkinson-Ryan & Baron, *supra* note 21, at 406–07. Wilkinson-Ryan and Baron note that their experimental results suggesting the importance of moral intuitions to legal judgments about contracts is impactful not only in the damages situation but also for "practical legal matters, including bargaining during contract drafting . . ." *Id.* at 423.

contract in moral terms may have an effect on the adjudicator's interpretation and enforcement of the contract.

The subsections below explore the ways in which the written contract can impact, manipulated or not, our *ex post* reaction to the contracting actors and contractual outcomes.

*A. Prototype Theory: Written Contract as a Prototype*

Prototype theory suggests that people organize their knowledge loosely around prototypes (such as a prime or best example of a particular category) when making judgments or decisions.<sup>46</sup> Possessing a prototype permits individuals to compare “features of the person or event to the characteristics of the prototype” and thereby “classify the person or event as a member of the category if it sufficiently resembles or corresponds to the prototype.”<sup>47</sup>

Prototype theory may have implications for contract law adjudication in a few areas. First, when examining a contract, judges or juries may compare the contract to the prototypical contract in their mind. If the contract conforms (e.g., if the contract has a signature block and a signature) to the prototypical “legal” contract, then we would expect judges and juries to enforce the contracts as written. If that is true, then the contract itself (rather than the contracting situation) becomes the most important factor. Thus, we can expect contracts, as prepared by repeat players or the more powerful contracting party, to omit terms that could raise concerns in the minds of adjudicators as to whether the contract deviates from the “prototype.” Many may believe, for example, that the prototypical contract should contain sufficient disclosure of material terms

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46. Feigenson, *supra* note 3, at 93.

47. *Id.* It should be noted that the exact causal mechanism associated with prototype effects is disputed. See Steven L. Winter, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 83–89 (2001). It may be, for example, that a different model of cognition can account for the existence of “prototype effects,” and that prototype theory is too limited in its cognitive focus on a particular prototype. For example, Winter describes the “idealized cognitive model” (ICM), which is described as a “‘folk’ theory or cultural understanding that organizes knowledge of events, people, objects, and their characteristic relationships in a single gestalt structure that is experientially meaningful as a whole.” *Id.* at 88. If such alternate models can better account for the existence of prototype effects, then whether contractual presentation influences or could influence our cognitive processes and schema according to such models would need to be separately considered. In any event, the purposeful presentation of a particular contractual prototype presumably would not be inconsistent with an ICM (by representing the “set of default assumptions operative within a culture,” in this instance regarding contracts) or this Article’s underlying argument about the desire to present a particular “consent” or “context” story to the adjudicator. *Id.* at 89. I am grateful to Steven Winter for his helpful comments and suggestions regarding the foregoing.



and indicate that the contracting party understood the terms to which she was agreeing in the contract. Another example is having the contracting party sign in multiple places, particularly with respect to material terms. Indeed, rental car contracts and mortgages often have multiple signature lines within the contract, in each instance next to a material term. Upon examination by the adjudicator, it then would be difficult to see how such contract deviates from the “prototypical” contract.

Note, however, that the existence of these multiple signature blocks does not in any way alleviate any of the situational pressures of the rental car contracting situation that generally result in little or no bargaining. Put another way, contracting parties can take advantage of adjudicators’ knowledge structures by creating contracts that conform to the prototype without actually modifying the contract situation for the contracting party. This does not mean that an adjudicator’s decision based on conformance to a prototypical contract is incorrect. In fact, given contract law’s emphasis on objective manifestations of assent, the most efficient manner by which to ascertain whether consent has been manifested may be to reason by comparison (e.g., by assessing whether the contract contains features that one would expect, based on experience with “fair” contracts, and which suggest assent) instead of viewing the particular contract in isolation or trying to envision an ideal contract “from scratch.” If the common law rule is based upon the objective manifestation of assent, it may be difficult to determine whether there has been such a manifestation if one did not have reference to a model or prototype. One obviously cannot accurately determine whether a manifestation exists without knowing what a manifestation looks like. Prototypes thus assist adjudicators in making particular factual or legal conclusions.

The issue for our purposes is that the format may, in some sense, be rigged. Contract law theory suggests that objective manifestations are important and need to be respected, in part because it would be inequitable for someone to rely on another’s objective manifestation only to suffer damage because the other’s subjective intentions did not match his objective manifestation.<sup>48</sup> For purposes of examining a contracting party’s

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48. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 209 (2004) (noting that “[a]ccording to the objectivists, a party’s mental assent was not necessary to make a contract. After all, was not contract law intended to protect *reasonable* expectations? If one party’s actions, judged by a standard of reasonableness, manifested to the other party an intention to agree, the real but unexpressed state of the first party’s mind was irrelevant.”); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 300 (1986) (“[I]n sum, legal enforcement is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.”). Even under a more realist approach, we are seeking the “discovery of

manifestations of assent, however, the contract may be the most important indicator of such a manifestation, even if that indicator does not explicitly indicate “who” is telling the “contract story.” Thus, the written contract itself can make it practically impossible to rebut the presumption of enforceability. Again, by reinforcing the “objective manifestation of assent” *and without changing the contract context or affecting contracting behavior*, we may find it difficult to deny or to envision denying the enforceability of a contract.

This last assertion cannot be overstated. If our *ex post* perceptions of the indicia of contract can be manipulated without affecting the contract context or contracting parties’ understanding or contracting behavior, then the utility of such indicia is called into question. If, for example, additional signature blocks do not in fact change whether car renters understand or negotiate the contracts, then citing additional signature blocks as evidence *after the fact* that the car renters made the promise or consented (and knew what they were signing) is somewhat unconvincing *unless* other relevant contextual evidence may be presented. The additional signature blocks may support such a conclusion, but they also very well may not.

The written contract is, in this manner, used not only to provide substantial evidence of the assent and agreement of the parties, but also as the primary evidence of the contracting context. If you signed a contract in multiple places, so the argument proceeds, the context in which you signed was fair and non-coercive, as the opportunity was available to you at each signature block to walk away from the contract. Although the context may in fact have been different, the above conclusion is the only one allowable when evidence of context can be presented only within the contract itself. If the context is different from that presented in the written contract, evidence relevant to the context should not necessarily be excluded or de-emphasized if it pertains to the contextual issue being presented.

Suppose that an investor, who was not provided the opportunity to ask questions about an investment, executes a contract that indicates that she *was* provided with the opportunity to do so. Should the written contract be permitted to indicate a different context than that which actually existed? Presumably, consent theorists would answer “yes” to that question, as one of the purposes of contract law is to voluntarily modify or transfer your property rights.<sup>49</sup> If the investor desired to contract away her property right

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the factual bargain,” albeit “unfettered by ‘technical’ constraints of classical contract law.” JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 19 (4th ed. 2001).

49. Barnett, *supra* note 48, at 297 (“[C]ontract law concerns enforceable obligations arising from the valid *transfer* of entitlements that are *already vested* in someone, and this difference is what makes consent a moral prerequisite to contractual obligation.”). But see G. Richard Shell, *Fair Play, Consent and Securities Arbitration: A Comment on Speidel*, 62

to assert later that she was not provided the opportunity to ask questions, then she may do so by providing her consent to the agreement that does so. This argument, however, is most compelling only when one assumes that situational influences and context largely do not matter when one executes a contract. Under this view, if consent was evidenced in the written contract, then consent was given, and the written contract, with its evidence of material terms, as well as evidence of context, is paramount. The importance of the consent to the contract, however, is based on an assumption about the context in which it is given. It is somewhat illogical to rely on consent as the significant legal act but ignore the contexts that influence (or do not influence) whether consent should be regarded as significant.<sup>50</sup> If additional signature blocks do not indicate or influence any change in contracting behavior, then their contextual relevance to consent should be resisted or at least viewed as incomplete.<sup>51</sup>

*B. Prototype Theory: Written Contract as Telling the "Right Story"*

The other way in which prototype theory is implicated is based upon the more powerful contracting party's knowledge that adjudicators will often aggregate information into a "story" or narrative.<sup>52</sup> Adjudicators in a

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BROOK. L. REV. 1365, 1371-72 (1996) (suggesting that "tacit consent" may fail to provide legitimacy of a particular legal system when too much "autonomy to private ordering" is conceded without proper oversight).

50. Warkentine, *supra* note 8, at 500 (noting that Barnett's belief that consent to unknown terms constitutes in some sense a valid assumption of risk is undermined by the fact that, under "the doctrine of assumption of the risk, an adhering party should not be bound to a contract term unless the party both knows of the existence of the particular contract provisions and appreciates their meaning."); *see also* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE. L. REV. 697, 703-06 (1990) (criticizing Barnett's consent theory for viewing consent interpretation as a straightforward and simple matter).

51. *See, e.g.,* Carroll v. Fremont Inv. & Loan, 636 F. Supp. 2d 41, 55 (D.D.C. 2009) (finding a question of fact to exist as to whether the parties intended to be bound by a contract where the party had signed only the first page of the contract, despite the presence of initials or signature lines on each of the four pages); IFC Credit Corp. v. Rieker Shoe Corp., 881 N.E.2d 382, 395 (Ill. App. Ct. 2007) (finding a forum selection clause to be enforceable because above the signature line in the contract was a clause alerting the signer that all terms and conditions of the agreement would be binding); Appliance Sales & Serv., Inc. v. Command Elecs. Corp., 443 S.E.2d 784, 790 (N.C. Ct. App. 1994) (finding a forum selection clause to be unenforceable where the clause was not highlighted and no signatures or initialing were nearby the clause); Dimaggio v. Labreque, No. CV000438800S, 2003 WL 22480968, at \*3 (Conn. Super. Ct. Oct. 9, 2003) (finding voluntary consent to a contract where a party "placed her initials after each of the paragraphs and signed her full signature before a witness on the last page").

52. Feigenson, *supra* note 3, at 97.

contract case are often asked to evaluate an act or series of acts, such as whether the contracting party acted in such a way to form a contract or whether one party acted in such a way to breach the contract. If the cognitive schema employed in such situations is a story or narrative about how such events occur or what they typically look like, then we should consider whether such schema could be influenced by the written contract itself.<sup>53</sup> If so, then regardless of whether adjudicators refer to a “narrative” (the contract story) or a known structure (the prototypical written contract), adjudicators may be influenced merely by the language employed by the contracting parties that may not in fact reflect the contracting situation.<sup>54</sup>

One way to construct the written contract so that it presents a particular story with respect to the contracting context is to include narrative recitals. Recitals are often used in preamble format to “set the stage” for, and state the purpose of, the contract without necessarily setting forth the material terms of the contract.<sup>55</sup> For example, in a forbearance agreement, recitals may indicate that the borrower has defaulted on numerous material obligations and that the lender is not obligated to extend additional time for performance or cure of the breaches.<sup>56</sup> Many of the facts in the recitals, however, may be stated in more precise legal terms or legalese within the more substantive provisions of the agreement itself. These recitals may not set forth the material terms of the forbearance agreement for the benefit, agreement, and understanding of the borrower and lender, but may instead be intended to provide a powerful story-telling device for the reference and understanding of the adjudicator. In the

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53. *Id.* at 96 (arguing that, because negligence cases ask juries to consider a particular event or associated events, “[w]e might, therefore, expect them to employ prototypes in the form of scenarios or stories.” Feigenson also cites “considerable psychological research [that] indicates that jurors typically organize complex evidence into narrative form . . .”). *Id.*

54. In another context, it has been suggested that “the best way to maximize the likelihood of judicial enforcement of gay couples’ cohabitation contracts is to expressly formulate them as business agreements, omitting any mention of the parties’ relationship.” Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DEN. U. L. REV. 1107, 1138–39 (1996). Thus, a cohabitation agreement may need to tell the “right” story or portray an “ordinary” business relationship to secure enforcement by the adjudicator *ex post*. I am grateful to Deborah Zalesne for her guidance and suggestions regarding the literature covering these types of agreements.

55. BLACK’S LAW DICTIONARY (9th ed. 2009) (defining recital as “[a] preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts”).

56. *See, e.g.*, 10 Westlaw Legal Forms, Debtor and Creditor Relations § 11:23 (Rev. 2d ed.) (model forbearance agreement with recitals); § 25:1 Introduction, PLIREF-COMLOAN § 25:1 (describing the draftsman’s objective to “position the lender to exercise its remedies in an efficient, summary manner, if the situation deteriorates”).

context of a lawsuit regarding borrowing arrangements and agreements, the recitals describing the lender's favorable demeanor and generosity towards the borrower (e.g., with respect to not exercising all rights and remedies available to the lender under the existing credit agreement) would make the terms of the forbearance agreement seem that much more reasonable as well as portray the lender in a more favorable light.

Significantly, though, the recitals may not tell an accurate or complete "story" (e.g., that of the generous lender agreeing to forbear). For example, agreeing to forbear may be routine business practice for lenders reluctant to force a debtor company into bankruptcy, where the lender's likely recovery is less than under a scenario where accommodations are provided.<sup>57</sup> In addition, borrowers may not be, in some sense, making a "real" choice when agreeing to the forbearance agreement. The alternative may be filing for bankruptcy, which may be unpalatable to the company and its employee-managers. The "choices" in the forbearance agreement are being made in a much broader context that, if known and understood, may be deemed relevant or important by the adjudicator; instead, the written agreement may provide the initial (and only) story of the forbearance. This story or narrative leads to judgments based on how "acceptable" a story can be generated from the information provided about a given situation.<sup>58</sup>

The written contract as part of the story-telling process is particularly important in light of the anchoring effect the existence of a contract may have.<sup>59</sup> Even if we could imagine an *ex post* adjudication where the entire contracting context were examined and considered, the presentation (and existence) of the written contract often serves as the "anchor" or initial story from which all deviations are made.<sup>60</sup> Adjudicators would likely

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57. § 25:1 Introduction, PLIREF-COMLOAN § 25:1 (explaining that "the goal is obviously to get the loans paid, but at this point in the relationship the borrower's position is 'You can call my loan but it won't come.'"); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1933 (1994) (discussing the reasons certain creditors may prefer forbearance to forcing a debtor into bankruptcy); 1 Problem Loan Workouts § 3:3 (2012) (Westlaw) (explaining how forbearance agreements "allow for a period of both continued operation by the borrower and negotiations between the parties" while relieving "the parties of the anxiety and urgency which surround the initial stages of any problem loan").

58. Feigenson, *supra* note 3, at 96 (citing evidence that juries' "judgments and the confidence with which they hold them depend on the ease with which they can generate acceptable stories from the data.") (citation omitted).

59. PLOUS, *supra* note 17, at 151 ("People adjust insufficiently from anchor values, regardless of whether the judgment concerns the chances of nuclear war, the value of a house, or any number of other topics."). Plous suggests that "it may be worth considering multiple anchors before attempting to make a final estimate" or decision. *Id.* at 152.

60. In any event, it may serve to reinforce the anchoring belief that the victim is responsible for the poor outcome. *See id.* Once an impression is made, an adjudicator is

resist any proposed deviations, particularly if the adjudicators have confidence in their initial judgment regarding the contract, which, in a circular fashion, can be influenced by the presentation and content of the written contract.<sup>61</sup> The importance of narrative arguments within written contracts, however, should not necessarily be overstated. If the elements of the contracting context are irrelevant or deemed relatively unimportant for *ex post* contractual adjudication, then such “stories” may not be employed as frequently. For example, we might expect fewer recitals in routine purchase orders issued and accepted by sophisticated commercial parties because the contracting context may be relatively irrelevant; that is, it may be extremely difficult to demonstrate procedural unconscionability or other contextual problems when such parties are involved. The sophistication of the parties and absence of situational contracting pressure may thus reduce the likelihood of employment of such narrative tools, at least for purposes of contextual presentation.<sup>62</sup>

### C. Causal Attribution: Written Contract as Counterfactual Indicator

Counterfactual analysis is another primary mode of analysis causation.<sup>63</sup> Utilizing the simulation heuristic, a type of this analysis,

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likely to search out and identify only that evidence that supports his or her conclusion. Reid Hastie & Robyn M. Dawes, *Rational Choice in an Uncertain World: The Psychology of Judgment and Decision Making* 32-33 (2001) (noting that a “decision maker’s thoughts are dominated by his or her initial impression, a phenomenon referred to as primacy effect or confirmatory hypothesis testing.”) (citation omitted); *see also* Prentice, *supra* note 4, at 365 n.143 (defining cognitive dissonance).

61. Feigenson, *supra* note 3, at 97 (noting that “audiences find stories that vary from their expectations, that leave gaps or contradict their ‘stock scripts’ or prototypes, to be dubious”). Note that, at trial, the next step after having constructed the initial presentation is to account within the “story” for the behavior that is being contested in the lawsuit. *See id.* at 98 (describing how, at least with respect to accident trials, the story presented must explain the deviation from the prototype). This step is not addressed in this Article because the prototype theory and its use in written contract is being examined solely for purposes of determining the extent to which perceptions of the contracting context can be influenced *ex ante* by the written contract. In other words, one should consider how important a starting point the written contract is for the story constructed by an adjudicator. The fact that attorneys would then have to add to the written contract’s story to explain the “deviant” behavior by one of the contracting parties is interesting but not relevant in this context.

62. Another explanation, of course, is that sophisticated parties may resist another’s attempt to employ such self-serving devices.

63. SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION*, 432 (2d ed. 1991) (explaining “norm theory” in terms of how people make decisions based on the emotions evoked by a particular outcome: “An abnormal event is one that has easily imagined alternative outcomes . . . the more easily imagined the counterfactual scenario, the more intense the emotion one experiences.”); Feigenson, *supra* note 3, at 116; Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO WASH. L. REV. 339, 345 (1992)

individuals may imagine alternative situations in which the outcome at issue did not result.<sup>64</sup> By identifying the alternative situations in which the negative outcome did not arise and comparing the similarities with, and differences from, the current situation, individuals assess what must have caused the current situation.<sup>65</sup>

In the contract situation, adjudicators are not always asked to determine the legal cause of a particular event. Often, the dispute concerns whether particular acts or omissions constituted a breach under the contract. With respect to examination of the contract context, however, the written contract can provide evidence of the "normal" state of affairs, a world where contracts do not exist absent the satisfaction of specific requirements.<sup>66</sup> In addition, when imagining scenarios, adjudicators typically try to determine the unusual act that (accordingly) led to the unusual situation (the existence of the contract).<sup>67</sup> Consequently, the adjudicator may be more likely to determine that the "deviant" act is the execution of the contract.<sup>68</sup>

Written contracts often evidence an awareness of counterfactual analysis. For example, a written contract may contain a provision, often in boldface near the signature block, that the signing party had an opportunity to review the contract with counsel. Based in part on the presence of such a provision, often an adjudicator may consequently determine that the signature was the act most easily avoided if the contracting party did not want to be bound by the terms of the contract. The "normal" state of affairs is thus a world of "no contracts," but the contracting party freely

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("Counterfactual considerations intrude at many stages in legal factfinding and decisionmaking. Sometimes we acknowledge their presence, but other times we remain unaware of them. Sometimes counterfactuals help focus our inquiry, but other times they lead us astray. Nevertheless, whether express or implicit, helpful or misleading, they are there.").

64. Feigenson, *supra* note 3, at 116; Hastie & Dawes, *supra* note 60, at 127.

65. Feigenson, *supra* note 3, at 116-17 (noting that "the more readily they [people who must identify the cause of a particular event] can construct an alternative scenario . . . the more probable they judge that alternative, and the more likely they are to think that . . . the actual event is the prior occurrence that is changed in the alternative story").

66. Obviously, what is required to form a contract has evolved over time and still is debated. See Murray, *supra* note 48, at 222 ("Something more than mutual assent, as manifested in offer and acceptance, has always been necessary to create an informal contract, i.e., the typical contract involving a bargain."); Barnett, *supra* note 48, at 297-98 ("Freedom of action and interaction would be seriously impeded, and possibly destroyed, if legitimate rights holders who have not acted in a tortious manner could be deprived of their rights by force of law without their consent.").

67. Feigenson, *supra* note 3, at 118.

68. *Id.* (noting that "the cause of an accident is likely to be perceived to be the act (or omission) that a protagonist could easily have chosen to do otherwise").

chose, after an opportunity to consult with counsel, to execute the contract. We should, though, question the “accuracy” of such a provision, particularly if there are other contextual clues relevant to the contracting situation. For example, when an employee is being asked to execute an employment agreement as a condition to employment, there are situational pressures present that may call into question any conclusion an adjudicator may make about the voluntariness of the employee’s consent based on the presence of an “attorney consultation” provision or similar provision.

Similarly, multiple signature blocks (or places where a contracting party signs his or her initials) may be included to encourage a particular form of counterfactual analysis rather than inducing the contracting party to actually read or signify agreement to a particular provision. Under counterfactual analysis, the events or acts most easily changeable are the contracting party’s multiple executions of the agreement. Accordingly, if the contracting party did not want to be bound by the agreement, there were multiple “stops” along the way where the contracting party could have walked away from the agreement.<sup>69</sup>

A related example is the so-called “click-through” agreement, where an Internet user agrees to a license or other agreement by “clicking” his or her agreement. Decisions regarding such cases indicate that adjudicators place importance on the particular act of “clicking,” even though the step may not indicate any “more” or “greater” agreement with the terms of the license agreement than if the license agreement had been merely posted on the pages from where the software or other computer product was going to be downloaded or used.<sup>70</sup> Using the simulation heuristic, adjudicators

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69. *Id.* at 118–19 (suggesting that, in the accident situation, “the more readily jurors can imagine a person acting differently and thus avoiding the accident, the more likely they are to find that the person’s conduct caused the accident, and that the person is at fault for not having acted otherwise”).

70. *See, e.g.,* A.V. v. iParadigms, LLC., 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) *aff’d in part, rev’d in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (“The Court finds that the parties entered into a valid contractual agreement when Plaintiffs clicked ‘I Agree’ to acknowledge their acceptance of the terms of the Clickwrap Agreement.”); *Mortgage Plus, Inc. v. DocMagic, Inc.*, No. 03-2582-GTV-DJW, 2004 WL 2331918, \*5 (D. Kan. Aug. 23, 2004) (“[I]t is undisputed between the parties in this case that Mortgage Plus had to affirmatively click the ‘Yes’ button in assenting to the Software Licensing Agreement as a prerequisite to installing the DocMagic software. . . . Plaintiff had a choice as to whether to download the software and utilize the related services; thus, under the specific facts presented here, installation and use of the software with the attached license constituted an affirmative acceptance of the license terms by Mortgage Plus and the licensing agreement became effective upon this affirmative assent. The Court finds the clickwrap agreement here is a valid contract.”); *Martin v. Snapple Beverage Corp.*, 2005 Cal. App. Unpub. LEXIS 5938, \*15 (2005) (reasoning that based on the internet user clicking “I agree” with respect to twelve boldface hyperlink



determine that the “deviant” act is the “click” of agreement, even though the click is likely irrelevant to the contracting party, who may not distinguish between those products where a “click” is required and one where it is not.<sup>71</sup> This provides adjudicators with a “step” to identify more easily the “cause” of a party being bound—or not bound—by a contract.<sup>72</sup> It is easy to imagine an alternative scenario where you (personally) did not click, or at least, it is harder to imagine such an alternative scenario where the license agreement is passively disclosed. Thus, we can more easily construct an alternative scenario that leads us to blame the actor if we can see that a positive action was taken—the “click.”<sup>73</sup> Somewhat as a

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topics, “it is easily inferred that persons who sought to purchase items through the website agreed to (and knew they were agreeing to) the terms of the official rules, and that the arbitration provision (a part of those rules) was easily an easily accessible paragraph that they could review”); *Groff v. Am. Online, Inc.*, PC 97-0331, 1998 WL 307001, \*5 (R.I. Super. May 27, 1998) (“Here, plaintiff effectively ‘signed’ the agreement by clicking ‘I agree’ not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement.”); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002) (“The terms of the EULA [End User License Agreement] were prominently displayed on the program user’s computer screen before the software could be installed. Moreover, the program’s user was required to indicate assent to the EULA by clicking on the ‘I agree’ icon before proceeding with the download of the software.”). Notwithstanding the above decisions’ emphases on such actions, “[l]awyers, law students and even law professors are quick to acknowledge that they themselves rarely read the forms they sign or the agreements they ‘click through’ on the Internet.” Warkentine, *supra* note 8, at 515.

71. See, e.g., *Martin*, 2005 Cal. App. Unpub. LEXIS 5938 at \*16–17 (discussing the specific requirement for a “click” in order to find an agreement).

72. *Hartzog*, *supra* note 33, at 1644 (describing how “[c]ourts tend to enforce clickwrap agreements that require an action on the part of the user, but they tend to shy away from enforcing browwrap agreements that require no outward manifestation of assent.”).

73. *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007) (concluding that “[u]nlike the impermissible agreement in *Specht*, the user here had to take affirmative action and click the ‘Yes, I agree to the above terms and conditions’ button in order to proceed to the next step.”); *i.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass 2002) (“The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds that they are. In short, i.LAN explicitly accepted the clickwrap agreement when it clicked on the box stating ‘I agree’”). It is unclear how much more likely this scenario actually is. It has been shown, for example, that very few people read the click-through agreements, which are presumably little different from information that was previously passively disclosed. See Nathaniel S. Good et al., *Noticing Notice: A Large-Scale Experiment on the Timing of Software License Agreements*, in *PROCEEDINGS OF THE ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS (CHI 2007)* (explaining survey results with respects to End User License Agreements (EULAs) as follows: “Only very few users reported reading EULAs often and thoroughly when they encounter them (1.4%). Members of a larger group categorize themselves as those who often read parts of the agreement or browse contents (24.8%). However, 66.2% admit to rarely reading or browsing the contents of EULAs, and 7.7%

corollary, we can imagine that if the software license agreement were passively disclosed on the Internet without a click-through agreement, we would be more inclined to point to the deviant act (or omission) as the passive disclosure, which would lead us to blame the licensor.<sup>74</sup>

*D. Hindsight Bias: Written Contract as Predictability Indicator*

Another behavioral bias that may be exploited through written contract is the hindsight bias, which is the tendency to judge that a particular event had a higher probability of occurring because one had the knowledge that the event did, in fact, occur.<sup>75</sup> We are likely to see something as a more probable, predictable, and foreseeable result once we know that the result has, in fact, occurred.<sup>76</sup> Thus, in litigated disputes, we may believe that an adverse outcome should have been better anticipated by the parties involved.

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indicated that they have not noticed these agreements in the past or have never read them.”).

74. Indeed, several cases support this conclusion. See *Netbula, LLC v. Blindview Dev. Corp.*, 516 F. Supp. 2d 1137, 1152 (N.D. Cal. 2007) (holding that a license agreement was not formed because the software could be installed and used without reading or clicking on the license agreement’s terms and conditions); *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001) (finding that the mere act of downloading software did not indicate assent to a license agreement).

75. Samuel Issacharoff, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law: Can there be a Behavioral Law & Economics?*, 51 VAND. L. REV. 1729, 1738 (1998) (describing the “the common tendency to assume the inevitability of those events that have actually transpired, regardless of the actual ex ante probability of their occurring in the future.”); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 90 (1995) (“When trying to reconstruct what a foresightful state of mind would have perceived, people remain anchored in the hindsightful perspective. This leaves the reported outcome looking much more likely than it would look to the reasonable person without the benefit of hindsight.”) (citation omitted).

76. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576 (1998) (“Research by cognitive psychologists has shown that the folk wisdom on hindsight is correct—past events seem more predictable than they really were.”) (citation omitted). There is a similar effect, the “outcome bias,” which is the “tendency to base assessments of a decision’s quality on its consequences.” *Id.* at 581; Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 911 (1998) (noting that people appear to confuse the difference between probabilities and consequences, the former being the “likelihood [the event] will occur; the payoff refers to the magnitude of the consequences”). Hastie and Viscusi note, for example, that “large losses can affect the perceptions of the preventability of an accident,” even though the amount of losses does not suggest a high probability of the accident or that the accident could easily have been prevented. *Id.* at 911; see also Kamin & Rachlinski, *supra* note 75, at 90 (noting that “people overestimate both the probability of the known outcome and the ability of decision makers to foresee the outcome”).

With respect to written contracts, we may expect provisions to reinforce this bias with respect to the contracting context. For example, a contract may include a provision that suggests the foreseeability of particular risks of using the contracted service (e.g., “The [buyer] agrees and acknowledges that the use of the service is hazardous and may result in the loss of life or property”). If the service does result in the loss of life or property, adjudicators are likely to (i) even in the absence of a contract, determine that the loss of life or property was more predictable than it was, simply because of the hindsight bias and (ii) conclude even more strongly that the buyer (the party that did not prepare the contract) should have anticipated such a result. If adjudicators consistently peer through the distorted lens of hindsight, the written contract can indicate upon which actor they should be focusing. Such disclosures, however, have been seen to be largely ineffective in communicating such risks and alleviating an individual’s optimism bias with respect to future risks.<sup>77</sup> Contracting parties who do not prepare the contract face biases at both extreme points of the contracting continuum: They are likely *ex ante* to underestimate the probability of negative outcomes when entering into risks, while the adjudicators are likely *ex post* to overestimate such contracting parties’ ability to do so.<sup>78</sup> This is particularly accentuated by our self-serving belief in hindsight to believe that we personally would have acted differently in the same situation.<sup>79</sup>

In a somewhat different scenario, the prospective investor typically is provided with a prospectus that is intended to disclose all material risks

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77. See, e.g., Zacks, *supra* note 36, at 1481 (noting that “the context of credit card disclosures and standard form contracts, however, suggests that disclosure alone does not result in better comprehension”); Prentice, *supra* note 4, at 374 (“Marketing scholars have demonstrated how difficult it is to correct invalid inferences derived from advertising through even concurrent disclosures. Similarly, sellers’ oral representations about great returns, investment safety, and the like can easily anchor investors’ expectations and then the natural human tendency to adjust insufficiently to new information will prevent the printed warnings in the subsequently signed written contract from sufficiently correcting the investors’ judgment.”) (citation omitted); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1032 (2000) (“While there is an obvious information asymmetry between issuers and investors, [o]ne must be careful to avoid the fallacy that if some information is good, more must be better.” (alteration in original)) (quoting FRANK H. EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 299 (1991)).

78. Kamin & Rachlinski, *supra* note 75, at 101 (suggesting that, as a result of the hindsight bias, “any untaken precaution,” at least in the tort context, “may later give rise to liability, even if that precaution could not reasonably have been justified *ex ante*.”).

79. Norman G. Poythress et al., *Reframing the Medical Malpractice Tort Reform Debate: Social Science Research Implications for Non-Economic Reforms*, 16 LAW & PSYCHOL. REV. 65, 99–100 (1992) (describing experimental demonstrations of such an effect). See *infra* Section II.E.

involved with a particular investment. Investors, however, are unlikely to read or assess properly such risks even in the presence of clear and conspicuous disclosure.<sup>80</sup> Such disclosure may nevertheless be cited *ex post* as additional proof that the risk was foreseeable, predictable, and known, and thus “[t]he [hindsight] bias converts the negligence standard into a quasi-strict liability rule.”<sup>81</sup> Even when statutes or regulations require such detailed disclosure, such a system is not necessarily effective in creating the “credible commitment” of disclosure necessary for investors to pay more for securities.<sup>82</sup>

Other areas of the law have recognized the dangers of the hindsight bias. Corporate law, for example, includes the business judgment rule, which precludes substantive review of a board of directors’ decision provided that certain procedural safeguards were followed when the decision was made.<sup>83</sup> This rule may be a safeguard against the hindsight bias, in this case “the concern that even a good decision can produce an undesirable result and can be judged unfairly in hindsight.”<sup>84</sup> Similarly, federal securities fraud claims may require evidence of specific intent to defraud, thus blunting the otherwise significant impact of a poor investment outcome upon the adjudicator attempting to assert seller liability.<sup>85</sup> In the

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80. Langevoort, *supra* note 30, at 682–83 (explaining “quite clearly why investors rarely read [or read carefully]” investment documents, such as the time-saving benefit investors receive from relying on a broker’s recommendation and avoiding the costs involved in personally assessing a possible investment). Langevoort nevertheless suggests improved risk disclosure as the solution for investment agreements involving sophisticated investors. *See generally id.* at 688–95.

81. Rachlinski, *supra* note 76, at 622; *see* Langevoort, *supra* note 30, at 682 (describing an *ex post* characterization of a failure to read a prospectus as “reckless” as being “troublesome on a number of levels,” in particular because such behavior is “quite normal and expected.”). Langevoort notes that “[s]ome judges may simply underestimate the regularity with which investors do not read, and thus treat those whose claims are litigated as aberrant.” *Id.* at 684.

82. Bainbridge, *supra* note 77, at 1033–34 (suggesting that such a “bond” would be better created through antifraud rules with expanded duties to disclose rather than mandatory specified disclosures).

83. JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 199 (3d ed. 2011) (“In general, courts will not undertake to review the expediency of contracts or other business transactions authorized by the directors . . . . According to the better view, the business judgment rule presupposes that reasonable diligence and care have been exercised.”); Issacharoff, *supra* note 75, at 1738 (explaining that the “business judgment rule in the law of corporate governance can be read as a means for lending caution against post facto assessments of liability of corporate directors and managers that might result from jurists reviewing failed business investments after the fact”).

84. Rachlinski, *supra* note 76, at 621.

85. *Id.* at 616–17 (noting that the “heightened pleading requirement means that a plaintiff must do more than merely allege that some prediction made by the defendant ultimately failed to come true” because “[t]here is no ‘fraud by hindsight.’” *Id.* (citing

tort context, courts often suppress evidence of subsequent remedial measures taken by a defendant to avoid the impression—often incorrect—that the defendant must have been negligent if subsequent remedial measures are taken.<sup>86</sup>

Instead of a safeguard, however, contract law presumes the foreseeability of risks in contracting contexts with respect to an executed contract and, as suggested by this Article, permits the artificial reinforcement of such foreseeability through different provisions of the written contract itself. The parol evidence rule, for example, excludes extrinsic evidence that contradicts or supplements written terms in an integrated written contract.<sup>87</sup> If the written term provides that a particular contractual context existed (*e.g.*, that an attorney was consulted), then the rule would potentially exclude extrinsic evidence that the context did not in fact exist.<sup>88</sup>

The parol evidence rule in some sense may be seen as reinforcing the hindsight bias because it may prevent us from reviewing *ex post* all of the evidence relevant to the contracting context. As a result, if a contract indicates that a particular risk is disclosed as a material risk, then the adjudicator's focus may be confined to that conclusion, reinforcing the adjudicator's preexisting hindsight bias that the loss was foreseeable to the "buyer." The parol evidence rule resists the introduction of evidence that may contradict a particular contractual outcome to the extent it is addressed in the written contract. Moreover, to the extent that a contract includes a merger clause (often under the direction of the contract preparer), which typically provides that the written contract is the complete and exhaustive agreement of the parties, the judge may exclude evidence of other understandings between the parties.<sup>89</sup> Although potentially desirable in certain highly sophisticated commercial contexts, it is less so where

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DiLeo v. Ernst & Young, 901 F.2d 624, 628 (7th Cir. 1990)).

86. Rachlinski, *supra* note 76, at 617–18 (arguing that, from a relevance perspective, a "rational factfinder" would not find subsequent remedial measures to be probative of negligence, but we nevertheless find evidence of such measures to be excludable to avoid an overreaction by juries). If juries do "overreact" to such measures and find defendants to be more likely to be liable, then courts are concerned that defendants will be deterred from engaging in such productive activities. *Id.*

87. FARNSWORTH, *supra* note 48, § 7.2.

88. Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 87 (2001) ("The law of contracts gives special status to the written word. The statute of frauds *requires* some contracts to be in writing. The parol evidence rule excludes extrinsic evidence of prior or contemporaneous understandings of an agreement when a document purports to encompass their entire understanding.") (emphasis added).

89. Warkentine, *supra* note 8, at 478.

certainty and reliability of the written terms of the contract do not necessarily reflect both parties' knowing and negotiated desires, such as in the case of a repeat commercial player and the end user consumer.<sup>90</sup> For example, if a particular contractual risk is disclosed and the event or loss warned of occurs, adjudicators are likely to be influenced by the predictability of the event or loss. The contractual provision thus heightens the preexisting hindsight bias without regard to the actual predictability of the event or loss *ex ante*.

*E. Defensive Attribution: Reinforcing Justice Through Written Contract*

Some of the examples discussed above demonstrate how written contracts reinforce the adjudicators' fundamental attribution error. By making the actor (in this instance, the contracting party that did not prepare the contract) the most salient actor, whether through the inclusion of multiple signature blocks or a "click-through" agreement, we tend to see such parties as the more likely "causal agents."<sup>91</sup> By including such provisions, a contract preparer can create a situation where adjudicators believe that others, including the adjudicators, could and would have acted differently if presented with the same contract.<sup>92</sup>

This could be based upon the contract preparer's understanding of defensive attribution, which is the tendency to blame the victim because of a desire to avoid believing that the bad outcome could have happened to them.<sup>93</sup> For example, in the securities law context, when lawsuits alleging

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90. See, e.g., Rachlinski, *supra* note 76, at 591–93 (noting the effect of the hindsight bias on *ex post* judgments under objective standards, subjective standards and foreseeability standards); Warkentine, *supra* note 8, at 538 (describing the effect of merger clauses in the standardized form context, and in particular, the "typical approach to treating a merger clause as a statement of the intent of the parties without exploring whether there was actual knowing assent to that particular contract term").

91. Feigenson, *supra* note 3, at 128.

92. *Id.* at 129; Prentice, *supra* note 4, at 404. This is not to say, of course, that the adjudicators' beliefs would be incorrect. See, e.g., Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1353 (2011) (arguing that requiring "that the consumer click for *each* benefit or right granted by the consumer to the website, rather than once to indicate agreement to *all* benefits or rights contained in the agreement, creates a more accurate bargain that may actually reflect the intent of the parties.") (emphasis added).

93. Jerry M. Burger, *Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive-Attribution Hypothesis*, 90 PSYCHOL. BULL. 496, 497 (1981) ("[T]he awareness of a severe accident generates for the individual a need to believe that the unfortunate event was controllable and may therefore be averted in the future."); Prentice, *supra* note 4, at 404 (noting that "jurors [like everyone else] wish to believe that they would not be victimized as plaintiffs have been").

seller fraud are brought in connection with an investment that has not gone well, juries may tend to blame the buyers because juries believe or want to believe that they would not have fallen victim to the same fraud.<sup>94</sup> We do not want to believe that we, going forward, are subject to the same risks and may suffer the same fate, so it is more comforting to attribute the cause of the outcome to the victim and the victim's disposition.<sup>95</sup> Similarly, our desire to believe in a world where outcomes are just and people are rewarded and punished based on their goodness suggests that we will naturally blame the victim.<sup>96</sup> In the contract context, adjudicators may desire to believe that they would not have consented to the contract as presented or would have acted otherwise in the contracting context—and it would not have happened if the victim were a good person—and consequently, the “victim” must be a careless person who should be held accountable.<sup>97</sup>

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94. Prentice, *supra* note 4, at 407 (“[P]utting all this together, it is likely that juries will be looking for human causes for investment losses; they may underestimate situational causes. Their initial tendency to blame the victim means that human nature places the burden of proof on plaintiffs, just as the law does.”). Rachlinski also describes how a belief in a “just world” results in a heightened perception of the foreseeability of an event, thus justifying blaming the victim. Rachlinski, *supra* note 76, at 582–83. We may be subject to the hindsight bias because of our desire to believe we are more knowledgeable than we actually are (“impression management”) by asserting we could have predicted the outcome of a particular series of events or acts. *Id.* at 582–84.

95. In the accident context, “[i]f we can categorize a serious accident as in some way the victim's fault, it is reassuring. We then simply need to assure ourselves that we are a different kind of person from the victim, or that we would behave differently under similar circumstances, and we feel protected from catastrophe.” Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73, 74 (1966). Our “perceptions about the economic behavior of others can be quite inventive,” while “[m]ost people, especially those with high self-esteem, express great confidence that they would not have been taken in by puffery and other claims that in hindsight seem based more on hope than experience.” Donald C. Langevoort, *Disclosures that “Bespeak Caution,”* 49 BUS. LAW. 481, 493 (1994).

96. Prentice, *supra* note 4, at 405–06.

97. Feigenson, *supra* note 3, at 136–137 (noting that, when assessing blame when a plaintiff has claimed to be harmed, “jurors may need to protect a belief that bad things only happen to ‘bad’ people, obviously a case of fundamental attribution error”). This may be particularly true when adjudicators or observers can imagine themselves in a similar situation. Burger, *supra* note 93, at 498 (noting that “situationally similar observers will then be motivated to deny personal similarity to the perpetrator.”). Note, however, that some have claimed that observers may be more inclined to perceive situational influences in such situations. Fiona Lee & Mark Hallahan, *Do Situational Expectations Produce Situational Inferences? The Role of Future Expectations in Directing Inferential Goals*, 80 J. PERSONALITY & SOC. PSYCHOL. 545, 554 (2001) (“[T]he overwhelming evidence of dispositional primacy in the literature may not necessarily reflect how people make inferences in their normal, everyday lives in which the situations encountered tend to be meaningful and recurring.”).

As seen above, adjudicators are susceptible to utilizing defensive attribution in their attempt to diminish the possibility in their minds that such an unfavorable situation could have happened to them.<sup>98</sup> Thus, by presenting a written contract that indicates voluntariness and other favorable contextual clues for contract enforcement (regardless of their truth), contract preparers can encourage the commission of attribution errors.<sup>99</sup>

The movement towards “plain English” may be an example of this. Plain English promoters suggest that a contract is “superior” if it discloses material terms in a more simple, straightforward, and understandable manner.<sup>100</sup> The existence of plain English within a contract may reinforce our perception of a voluntary promise, since presumably the contracting

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98. See *supra* Section I.B.

99. Langevoort, *supra* note 95, at 494 (discussing the danger that “judges implicitly may invoke the false consensus of a highly personalized ‘How would I have read the disclosure,’ and in so doing, apply a standard of investor rationality that does not reflect the actual behavior of the population at large.”). Moreover, these judgments are made with the knowledge “that this particular reliance was indeed unwise. In hindsight, it is easy to find fault with reliance on self-interested others.” *Id.* As an interesting sidenote, Langevoort explains the “bespeaks caution” doctrine, which prevents investors from recovering for fraud if seller projections are accompanied by satisfactory cautionary language, as evolving in part from the above-described biases, “wherein a good bit of language exists that marginalizes those investors who willingly rely on expressions of optimism. . . . In real life, optimism sells.” *Id.* Langevoort cautions against “giving boilerplate cautionary language talismanic power, for forecasts and projections can mislead reasonable investors notwithstanding their typically self-evident disclaimers.” *Id.* at 503. In the standard form contracting context, it has been recognized that the model of a negotiated agreement based on mutual assent may not apply, so the “inquiry, therefore, shifts to a question of which terms will be deemed part of the contract and which terms will not.” Warkentine, *supra* note 8, at 479-80. The limitations of the inquiry are described in Section III. *infra*.

100. See Debra Pogrud Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL’Y & L. 85 (2010) (describing increased and improved disclosure as being the main tool utilized by the federal government to protect consumers from predatory lending); Kenneth B. Firtel, Note, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 871, 872 (1999) (“According to the SEC, one of the disclosure’s key deficiencies is that issuers fail to make the prospectus readable and understandable to the general investing public. This problem stems from two sources: (1) the issuers’ efforts to obscure rather than explain certain key topics in the prospectus; and (2) the length and complexity of the documents. . . . But, according to the SEC, if they could somehow compel clear writing, all investors could understand the information.”) (citation omitted). Although unexamined here, it would be interesting to assess whether the deference that a form contract induces on the part of the contracting party that did not prepare the contract (because it appears “legal”) also has a similar effect on adjudicators. See Prentice, *supra* note 4, at 372; Shell, *supra* note 49, at 1368-69 (“It is apparent to anyone looking at the printed form that someone in the legal department has given it a lot of thought . . .”).



party must have understood (or should have understood) the contract.<sup>101</sup> The voluntariness of the promise in turn has significant moral implications for the adjudicator.<sup>102</sup> To the extent that terms are construed as promises or commitments, we are more likely to believe that they should be enforced as presented.<sup>103</sup> Thus, “lay intuitions are still relevant in how people interpret

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101. Many such cases have evolved from the common law “duty to read” a contract. *See, e.g.,* E.H. Ashley & Co. v. Wells Fargo Alarm Serv., 907 F.2d 1274, 1279 (1st Cir. 1990) (noting that the relevant clause “was set forth in the most conspicuous print on the first page of the contract. The contract was written in plain English”); *Tranchant v. Ritz Carlton Hotel Co.*, 2011 U.S. Dist. LEXIS 35099, \*15–16 (M.D. Fla. Mar. 31, 2011) (noting that “[t]he record also suggests that plaintiff was fully capable of reading and understanding the terms of the agreement . . . as it was written entirely in simple, plain English, as opposed to ‘legalese’”); *Bunge Corp. v. Marion Williams*, 359 N.E.2d 844, 847 (Ill. App. Ct. 1977) (noting that, under Illinois law “[a] person is presumed to know those things which reasonable diligence on his part would bring to his attention,” and finding sufficient direction within the contract to note the existence of the arbitration provision (citing *Vargas v. Esquire*, 166 F.2d 651, 655 (7th Cir. 1948))); *Denlinger, Inc. v. Dendler*, 608 A.2d 1061, 1070 (Pa. Super. Ct. 1992) (noting that, under Pennsylvania law, one may not complain that he or she did not know what was contained in the executed contract, and that in the case at hand, the terms were provided in “clear and distinct type,” in plain English, and “[t]he term ‘Applicant’ is always capitalized, which draws attention to it”).

102. *See generally* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, introductory note (1981) (noting “the sanctity of contract and the resulting moral obligation to honor one’s promises”); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 40 (1981) (observing that contracts are “grounded in the primitive moral institution of promising”); T.M. SCANLON, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86 (Peter Benson, ed., 2001) (“The law of contracts is clearly a social institution, backed by the coercive power of the state and subject to modification through judicial decisions and legislative enactments. Promising is also often seen as a social institution of a more informal kind, defined by certain rules that are not enacted but rather backed by moral argument and enforced through the informal sanction of moral disapproval. Many have argued that the wrong involved in breaking a promise depends essentially on the existence of a social practice of this kind.”); Wilkinson-Ryan & Baron, *supra* note 21, at 409–10 (discussing the moral intuitions associated with contracts); Andrew Galbraith & Jason Dean, *In China, Some Firms Defy Business Norms*, WALL ST. J. ONLINE, Sep. 6, 2011, <http://online.wsj.com/article/SB10001424053111903895904576546381512015722.html> (describing how, in some cultures, contracts lack the moral element that exists within U.S. business culture). *But see* Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 439–40 (2006) (describing, but disagreeing with, the proposition that all breaches of contractual promises should be disapproved of morally); Seana Valentine Shffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 720 (2007) (arguing that contract theory diverges from moral components: “First, contract and promise diverge in some significant ways, although not by directly generating inconsistent directives. Second, some of the standard arguments for the doctrines’ divergence are exactly the sort of justifications that a virtuous agent could not accept. Third, even though some reasons for the divergence may be acceptable to a virtuous agent, the divergence itself may risk another difficulty by contributing to a culture that may be in tension with the conditions for the maintenance of moral character.”).

103. Wilkinson-Ryan & Baron, *supra* note 21, at 410 (“Parties’ beliefs about the

its [a contract's] terms," and presumably the terms can reinforce those lay intuitions.<sup>104</sup> When presented with a situation where the contracting party appears to be acting more outrageously by breaching a "voluntary" contract, our moral intuitions about the sacredness of the promise lead us to judge the contracting party more harshly.<sup>105</sup> Presumably, the more plain the English is within the contract, the easier it is for us to impute intentionality or knowledge to the contracting party suing or being sued for a breach or enforcement of the contract.

The contract preparer often is in the most favorable light, such as in recitals of a forbearance agreement where the lender is presented as a generous and gracious party.<sup>106</sup> A clause may also indicate the importance of a particular clause (e.g., "The parties agree that [the contract preparer] would not have entered into this agreement without [the non-contract preparer] agreeing to the following . . .") and the sincerity of the contract preparer in preparing the agreement in a particular manner. The adjudicators presumably are more likely to find that the contracting party (the non-preparer) herself is responsible because of her disposition (presumably, an irresponsible nature) amid such a contracting context.<sup>107</sup> By presenting a particular vision of the contracting "situation," contract preparers deemphasize the contracting context in order to emphasize the blameworthiness of the actor. Accordingly, we are led to conclude that the disposition of the actor led to the contract's execution. The written contract is not only based on this disposition but also reinforces it through its provisions themselves. The blameworthiness of the individual actor is

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contract were informed by the terms of the contract itself as well as their intuitions or beliefs about contracts in general, namely, that they are enforceable as written.").

104. *Id.* at 410.

105. *Id.* at 406–07 (explaining the results of their experiment where people judged the breaching party more harshly based on the motivations, intentions, and timing of the breaching party). Wilkinson-Ryan and Baron also discuss other tort experiments demonstrating that individuals imposed punishments "based on the moral rule that the punishment should be proportionate to the outrageousness of the act, regardless of whether the punishment would be useful, pointless, or even harmful." *Id.* at 411. They predict that, in the contract context, people will be unable to detach the moral aspects of a breach even when it may be an "efficient" result. *Id.*

106. *See supra* Section II.B. In the accident situation, we may expect attorneys to construct "suitable personality profiles for the parties." Feigenson, *supra* note 3, at 138. So, too, with contracts, we may expect contracts that demonstrate the reasonableness of the contract preparer. The more reasonable the contract preparer seems, the more likely it is that the other contracting party will be perceived as responsible for any contractual act.

107. *See supra* notes 89–95. If the contract can answer our desire to believe that everyone receives his or her just fate by presenting believable personalities of each of the parties, then adjudicators will be more comfortable blaming the "bad" contracting party (presumably, the party that did not prepare the contract).

highlighted in the contract, which reinforces the blameworthiness and legal significance of the actor's consent to the contract.<sup>108</sup>

Context manipulation is possible through the use of particular formatting features as well. Ostensibly to warn an investor (to prevent a fraud or other securities claim), a subscription agreement typically contains disclosures advising of the risk of loss or other restrictions of the particular investment. These disclosures often are presented in an explicit fashion, whether through the use of capital letters and boldfaced type or by being set aside in separate paragraphs or pages. Evidence suggests, however, that investors routinely ignore these warnings.<sup>109</sup> The impact on an adjudicator can be substantial, however, as the warnings might suggest that the contracting party had control and was aware of all contractual provisions.<sup>110</sup> The investor, therefore, is more blameworthy and should be held accountable under the written contract. This effect may be particularly strong in light of the adjudicator's tendency to blame the investor in any event.<sup>111</sup>

Similarly, the "relevant" evidence to an adjudicator or legislator with respect to a particular contractual term may be its conspicuousness.<sup>112</sup>

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108. In this particular situation, it is noteworthy that this provision is also a useful "counterfactual indicator" to an adjudicator; that is, the fact most easily changed is not signing the contract, particular if the contracting party knew (because of the presence of this provision) how important the contract or provision was to the other party. *See supra* Section II.C. These manipulations, then, may operate on many different levels and serve to address and influence several judgment heuristics or biases.

109. Prentice, *supra* note 4, at 348.

110. *See, e.g., Carr v. CIGNA Sec. Inc.*, 95 F.3d 544, 547 (7th Cir. 1996) (emphasizing the importance of the warning being provided "in capitals and bold face that it was a RISKY investment"); *Elsken v. Network Multi-Family Sec. Corp.*, 49 F.3d 1470, 1474 (10th Cir. 1995) ("Based upon a plain reading of the contract, Patricia Elsken agreed to the contract in its entirety as written. She signed directly below a statement in conspicuous, bold capital letters declaring the signing party was agreeing to the entire Services Contract.").

111. *See, e.g., Prentice, supra* note 4, at 406 (observing that "[t]his desire to make themselves feel comfortable in their environment, coupled with the illusion of control discussed earlier, the desire to feel free from potential victimhood, and to believe that they live in a just world all factor together to make it easier for jurors and others to blame investors for their own losses, stupidity, and gullibility").

112. *See Johnson v. Ubar, LLC*, 150 Wash. App. 533, 538 (2009) (discussing the statutory requirement for contractual waivers to be conspicuous); *Lee v. Goldline Int'l, Inc.*, 2011 U.S. Dist. LEXIS 52490, at \*2-3 (C.D. Cal. Apr. 27, 2011) (noting that the provision in question was "prominently displayed, much of it is in all capital letters and bold, and it is worded in very plain English. There is no reason to believe that a contracting customer would not notice the provision or would fail to understand its meaning."); *Widlar v. Matchmaker Int'l*, 2002 Ohio 2836, at \*2 (June 7, 2002) (noting that the terms and conditions, provided on the reverse side of the contract, were in a larger font than the rest of the contract); *Grodel v. Arsham*, 2007 Ohio 1715, at \*9 (Apr. 12, 2007) (describing the contract as being "composed of a single page with the cancellation and refund provision

Conspicuousness, however, is defined within the context of the written contract itself, rather than within the broader contractual context.<sup>113</sup> The buyer thus is liable under the written contract because she is blameworthy or because she acted with respect to the contract in a manner that suggests her blameworthiness, and she is blameworthy because the written contract suggests she is.<sup>114</sup>

For example, the inclusion of a non-reliance clause has been promoted as preventing the buyer from asserting *ex post* “‘I lied when I told you I wasn’t relying on your prior statements’ and then seek[ing] damages for their contents.”<sup>115</sup> A behavioralist review of such subscription agreements, however, suggests a different conclusion. In particular, relying on oral representations instead of reviewing and emphasizing the written subscription agreement containing a disclaimer of representations clause is less blameworthy than has otherwise been suggested.<sup>116</sup> Far from being the intentional liar regarding a disclaimer of oral representations, the investor appears from contextual evidence to be a much more benign figure.<sup>117</sup> It also may be a mistake to exclude contextual evidence, such as evidence of the sophistication of the parties, which could be relevant to an adjudicator’s decision regarding the blameworthiness of the investor.<sup>118</sup>

Similarly, recent federal credit card regulation promotes “clear and

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printed in the same print size as the other clauses”).

113. *Johnson*, 150 Wash. App. at 1023 (listing the factors as “whether the waiver is set apart or hidden within other provisions, whether the heading is clear, whether the waiver is set off in capital letters or in bold type, whether there is a signature line below the waiver provision, what the language says above the signature line, and whether it is clear that the signature is related to the waiver.”); *La Fata v. LA Fitness Int’l*, 2008 Cal. App. Unpub. LEXIS 7926, at \*4–5 (Sep. 15, 2008) (finding that “La Fata cannot be heard to complain that he did not actually read or understand the provision” since it was “in bold-face type, in a font that is larger than the font for the rest of the agreement, with a capitalized heading identifying its purpose and characterizing it as ‘important.’”); *Universal Underwriters Ins. Co. v. Allstates Air Cargo, Inc.*, 820 A.2d 988, 993 (Vt. 2003) (explaining its concern with “the lack of a highlighted warning” where a limitation of liability clause is included); *Walnut Equip. Leasing Co., Inc. v. Moreno*, 643 So. 2d 327, 332–33 n.3 (La. Ct. App. 1994) (examining the statutory requirements of being written, clear and conspicuous for waivers of warranties under Pennsylvania law, and to be satisfied where the provision was placed “in the middle of the front page, and was distinguished from the remaining provisions by bold, capitalized letters”).

114. *See supra* note 113.

115. Prentice, *supra* note 4, at 347 (citing *Rissman v. Rissman*, 213 F. 3d 381, 383 (7th Cir. 2000)).

116. *See generally* Prentice, *supra* note 4, at 358–78 (examining the reasons that investors do not and rationally should not rely on such clauses).

117. *See id.* at 378 (concluding that “[u]nfettered private ordering leaves investors at the mercy of sellers who would take advantage of the investors’ cognitive limitations and behavioral heuristics”).

118. *Id.* at 347.

conspicuous” disclosure in credit card agreements.<sup>119</sup> Such agreements, however, are unlikely to be read or negotiated by credit card holders as the result of behavioral biases even in the presence of more or better disclosure.<sup>120</sup> These disclosure reforms, however, were promoted as helping “consumers make informed choices about using the right financial products and managing their own financial needs.”<sup>121</sup> The same biases underlying the assertion that such disclosure is effective send similar signals to adjudicators regarding the blameworthiness of the debtors who complain about particular terms contained in their credit card agreements.

What is most interesting and potentially problematic about these provisions is that they can suggest explicitly (e.g., through recitals or a provision stating an attorney was consulted) or implicitly (e.g., through multiple signature blocks) the state of contracting affairs *without regard to the empirical truth of the description*. These descriptions also typically do not bear on material terms of the contract. Instead, their appearance seems to be designed specifically and exclusively to present a favorable contracting context and thereby support both the enforceability of the contract and blameworthiness of a particular party. The contract preparer thus implicitly acknowledges that context is important, while at the same time typically emphasizing the relevant contextual evidence within the written contract. As we have seen, however, that context is subject to manipulation.

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119. See generally Zacks, *supra* note 36, at 1479–91 (discussing disclosure reforms of the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009).

120. *Id.* at 1475. This may be true regardless of whether the legislation mandates a specific form and manner of disclosure (which will reflect the legislature or agency’s beliefs about what type of disclosure is effective) as opposed to a standard for disclosure (which will reflect the adjudicator’s beliefs about what type of disclosure is effective). The contract preparer’s ability to influence the latter, of course, is the primary subject of this Article.

121. Press Release, Fact Sheet: Reforms to Protect American Credit Card Holders, White House (May 22, 2009), [http://whitehouse.gov/the\\_press\\_office/Fact-Sheet-Reforms-to-Protect-American-Credit-Card-Holders](http://whitehouse.gov/the_press_office/Fact-Sheet-Reforms-to-Protect-American-Credit-Card-Holders); Nancy Trejos, *Major Changes in the Way Credit Cards Work*, WASH. POST, May 23, 2009, at A13 (quoting Senator Christopher J. Dodd as indicating “[w]ith the signing of this bill, President Obama has ushered in a new era where consumer protections will be strong and reliable, rules transparent and fair, and statements clear and informative”); Paul Gores, *Shackles made plain: New rules will disclose pitfalls of making monthly minimum payments on credit cards*, MILWAUKEE J. SENTINEL, Jan. 31, 2010, at D1 (Claire Anne Resop, bankruptcy attorney and U.S. Bankruptcy Court trustee: “I do believe a lot of consumers have no idea how long it’s going to take them to pay off their bill if they only make the minimum payment . . . I think a lot of consumers will take note of that because they don’t sit and figure it out.”).

### III. RESPONDING TO THE MANIPULATION CRITIQUE

The critique offered in Section II suggests that contract preparers may manipulate our ability to assess the blameworthiness of contractual actors after the fact. Section III responds to this critique by offering justifications for, and rejections of, the scenarios and outcomes described above.

#### *A. A Written Contract Sets Forth the Agreement on Context*

One can initially respond to the critique outlined above by noting that a written contract is, in some significant sense, intended to reflect a voluntary agreement to transfer property rights.<sup>122</sup> Thus, if parties describe (in the written contract) the context in which the parties have agreed to transfer their property rights, then we should respect their agreement as to what that context was. If, for example, the provisions of the written agreement provide that I had access to counsel during the course of negotiations, then the adjudicator would be correct to presume, whether through the use of judgment heuristics or otherwise, that I either (i) had access to counsel or (ii) voluntarily agreed to suffer the legal consequences of agreeing that I did have access to counsel, regardless of whether I actually had such access.

Another way of framing this response is to assert that all contract provisions are voluntary stipulations and should be viewed as terms of the contract, regardless of whether they are relevant to the “deal” or the contracting context. For example, if a provision indicates that the contract preparer would not have entered into the agreement absent the other contracting party’s agreement to a particular provision, then presumably, this is the stipulated understanding and enforceable agreement of the party.<sup>123</sup> It is not, accordingly, some sort of manipulation designed to describe the contract preparer’s reasonableness or sincere motives. Similarly, it is not inconsistent for the contract to “tell a story” in accordance with behavioral biases (and portrayals of blameworthiness) if the overall purpose of the contract is to ensure that the written contract is respected as the agreed-upon state of affairs. This may be particularly true given that “[b]iased assessments in hindsight are well-understood, and it is therefore not necessarily unfair to subject potential defendants [in this

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122. Farnsworth, *supra* note 48, § 11.1 (discussing contract rights as a type of intangible property, the transfer of which is governed by special rules).

123. It similarly could be designed to assist one party in the event that the party sought to be excused from performance under the contract (e.g., in the event that the material term was not fulfilled). My thanks to Meredith Miller for highlighting this issue.

instance, contracting parties] to them.”<sup>124</sup>

Additionally, if we value the written contract because of its certainty of enforcement, then no one is harmed by including contractual provisions that reinforce such certainty.<sup>125</sup> Moreover, if we are concerned with the ability of adjudicators to apply the contract as written, we should expect contracts, as drafted by those who prepare and negotiate them, to tell the “right story” so that adjudicators’ behavioral biases and judgment heuristics correspond with the “right” contract law doctrine outcome. We should want to avoid discussion of the situation outside of the written contract and determine if the written contract reflects the correct consent or promise. As a result, we can prevent the reinvention of the agreement of the parties. In the securities fraud context, for example, judges have sometimes excluded evidence of oral fraud if the investment subscription agreement contradicted the oral misrepresentations.<sup>126</sup> Such exclusion prevents a seller from being uncertain about being protected *ex post* “against plausible liars and gullible jurors.”<sup>127</sup> The same uncertainty could arise if evidence were permitted regarding the contracting context beyond that which is presented in the contract itself.

I would respond to these objections with two distinct lines of argument. First, with respect to the difference between context manipulation and actual recitation of material contract terms, it admittedly will be a close call in several instances, such as a provision regarding the motives of the parties when entering into an agreement described above. It does not follow, however, that a contract, particularly one between a “repeat player” and a non-commercial party or involving other potentially troubling contexts, should be permitted to contain terms that contradict the

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124. Rachlinski, *supra* note 76, at 602. Rachlinski is addressing such issues in the tort context, but an individual’s perception of the likelihood of biased *ex post* judgments certainly would apply in the contract context as well.

125. Farnsworth, *supra* note 48, § 1.6 (“Unless agreements can be relied on, they are of little use” (regardless of whether a person does in fact rely on the agreement in question)); RANDY E. BARNETT, *THE OXFORD INTRODUCTIONS TO U.S. LAW: CONTRACTS* xix-xx (2010) (“Contracts enhance our ability to rely on the commitment of another person by creating a right to legal enforcement of that commitment in case of its breach. So the second concern of contract law is protecting the *reliance* of each party on the commitment of the other.”).

126. Prentice, *supra* note 4, at 345-49 (discussing two such cases); *see supra* Section II.D for a discussion of the parol evidence rule and similar contractual outcomes.

127. *Id.* at 346 (quoting *Carr v. CIGNA Secs. Inc.*, 95 F.3d 544, 546). The “curious rhetorical feature” of courts to chastise certain contracting parties for behaving poorly in their opinions can be understood as “the scolding of [the] case.” Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 33 (2001). In particular, DeLong notes how formalist courts may be quick “to chastise losing parties for failing to read agreements before signing or failing to get critical promises in writing.” *Id.*

truth of the contracting context.<sup>128</sup> For example, in the context of securities fraud, the prospectus and other investment agreements should not logically be used to exculpate the seller from fraudulent oral representations given in the broader contracting context of the seller-investor relationship.<sup>129</sup> Similarly, if a written contract suggests a particular state of affairs with respect to the context, whether regarding access to counsel or otherwise suggesting the voluntariness of the transaction, the written contract should not necessarily be dominant when reviewing contextual evidence.<sup>130</sup> It may be true that the “perceived fairness of the system of civil liability” would be undermined if “repeat players . . . notice the tendency of biased judgments to raise standards after the fact, as might judges.”<sup>131</sup> On the other hand, if we show such concern for the repeat players when the hindsight bias cuts against them, presumably we can and should be concerned when the hindsight bias favors them.<sup>132</sup>

Second, the purpose of this Article is not to articulate a view towards dismissing the written contract, but instead it is to contemplate a fuller view of the written contract, particularly with respect to situational contexts and their impact on adjudicators. If written contracts evidence an awareness of *ex post* behavioral biases and situational evidence and attempt to manipulate adjudicators’ perceptions, then perhaps we should be open to conclusions that contradict the view of the written contract as sacred.

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128. See, e.g., Rachlinski, *supra* note 76, at 602 (arguing that “an unbiased judgment clearly would be superior to a biased one”).

129. See Prentice, *supra* note 4, at 419 (“[M]any courts have given effect to disclaimers, no-reliance clauses, and/or merger clauses. . . . These cases encourage fraud and are inconsistent with congressional intent under the ‘33 and ‘34 Acts. Behavioral analysis demonstrates that they are also unwise policy.”).

130. In response, one may assert that “does not” is not equivalent to “cannot”; that is, that merely because individuals do not subjectively comprehend a particular contractual term does not mean that the individual is incapable of doing so, which in turn leads to the conclusion that the individual should be bound by the individual’s objectively manifested consent to a term, regardless of whether subjective comprehension was achieved. This objection, however, does not address why contracts are structured so as to appear to generate subjective comprehension or consent (e.g., through plain English or multiple signature blocks), which is the central focus of this Article.

131. Rachlinski, *supra* note 76, at 602.

132. To some extent, this is an argument about the importance of subjective comprehension. Contract law, as discussed above, is premised on objective manifestations of consent. If, however, people make those manifestations routinely and without contemplating legal significance, and moreover, if the contract preparer knows that, then it is not clear why the manifestations (signing or clicking through a contract) should be respected, or at least, it is not clear why they should be respected based on features that do not reflect subjective comprehension. The defenders of contract law, in some sense, try to have it both ways by asserting that only consent matters but then relying on features of contracts which do not necessarily implicate actual promise or consent.



Admittedly, one may be reluctant to accept, much less embrace, a worldview that diminishes both the voluntary capabilities of a contracting party as well as the manipulability of adjudicators.<sup>133</sup> This reluctance, however, cannot and should not be defended based on our illusions regarding situational influences or the importance of such illusions to the legal system.<sup>134</sup> In addition, the importance of predictability of a legal system's privately ordered outcomes is potentially diminished if the particular outcomes are not those desired by the individuals involved or if such outcomes have been manipulated.<sup>135</sup>

Arguments about the importance of contract law doctrine alone (such as focusing solely on whether there was consent or promise) also likely ignore the "blaming" that occurs when an adjudicator determines a particular lawsuit. The "blameworthiness" of various actors with respect to a contract lawsuit is an important factor in adjudication.<sup>136</sup> If adjudicators are already making conclusions about an individual's disposition regardless of whether such evidence is presented or excluded, then a contract that introduces such evidence could influence the conclusion about a particular person. Put another way, we should expect our conclusions about whether the contract law requirements have been met in the particular instance to be influenced in some respect by the level of blameworthiness as presented in the contract. For example, it has been demonstrated in the tort context that jurors employ holistic judgmental strategies, which means, for example, that jurors consider blameworthiness in contexts where the law does not require it, such as the calculation of damages.<sup>137</sup>

The difference in the contract context, of course, is that the written contract may be prepared in contemplation of such jurors' blameworthiness judgments and structured accordingly. There may be, as a result, instances where the contractual evidence of the contracting context (e.g., if it was

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133. Hanson & Kysar, *supra* note 12, at 747–48.

134. Hanson & Yosifon, *supra* note 7, at 179 (arguing that "our greatest dispositional act may be to acknowledge that we are situational characters and to choose to understand and gain some voice and control over the situation that largely controls us. In that very important sense, we do have a choice").

135. See, e.g., Welle, *supra* note 27, at 528 (criticizing particular securities deregulation advocates of "simple, bright-line rules" promoting private ordering (and certainty and predictability in outcomes) as appearing "willing to sacrifice the interests of the community to protect the economic interests of certain individuals").

136. Park, *supra* note 3, at 739–40 (discussing the various dispositionist conclusions that are made by adjudicators, regardless of the presentation of relevant evidence).

137. Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 609 (1997) (describing the varying effect of blame on jurors' damage decisions depending on the severity of the outcome caused by a tortfeasor).

coercive) contributes to a particular dispositional conclusion (the contracting party was “hasty” or “lazy” and should be blamed for all contractual outcomes), which may have implications beyond the contracting context. Thus, the contracting party with the “bad” disposition is potentially liable for a higher amount of damages based on dispositionist conclusions that are irrelevant to traditional contractual damages calculation metrics.

Lastly, it is somewhat tautological to argue that we should diminish or disregard contextual defenses based on a written contract that presupposes and reinforces the voluntariness of the contract. Under that line of argument, the situation or context regarding consent is irrelevant because the written contract indicates that consent was voluntary. It is based on a powerful presumption of consent where the physical evidence of consent is the most significant factor in determining the existence of a contract. Of course, this does not mean that the written contract is incorrect or that the contracting context was not as might be desired. It does mean, however, that we should recognize the choice and the situation in which the choice is made and consider whether the contract choice reflects the reality in decision-making, particularly when considering reforms to contract law.

### *B. Cognitive Biases and Judgment Heuristics Are Effective*

As another response to the manipulation concerns outlined in this Article, one may argue that the behavioral biases and counterfactual analysis may lead to accurate conclusions and judgments, or at least cannot be shown to be demonstrably incorrect.<sup>138</sup> For example, multiple signatures to a written contract may in fact be the single most important factor in determining whether consent was provided in a voluntary context and on a knowing basis. If the Internet user did not want the particular computer software, so goes the argument, then she was not required to click her assent to the contract. In addition, others have described the superior ability of human beings over computers with respect to solving particular

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138. Feigenson, *supra* note 3, at 119; Funder, *supra* note 3, at 83 (noting that with respect to the accuracy of social judgment, “the question is probably unanswerable. It can only have meaning in relation to a second question: Compared to what?”); Tetlock, *supra* note 6, at 468 (arguing that “response tendencies that look like errors and biases given one set of functionalist assumptions often look prudent given another set of functionalist assumptions. Before labeling an effect an error or bias, one should consider: (a) the interpersonal and political goals that people are trying to achieve by making judgments of a particular type”). In any event, one would like to have empirical data demonstrating whether certain contractual provisions, in a “real-world” setting, do in fact have the ability to manipulate *ex post* adjudicator perceptions of the contracting context.

problems as being attributable to the “broad array of real-world knowledge and experience” available to human beings, which presumably still involves the cognitive biases that otherwise are criticized.<sup>139</sup> Thus, our cognitive biases may be serving us well.

The issue, though, is that even if such judgment processes are largely effective, which is not conceded here, it does not necessarily follow that “false indicators” should be permitted or respected. For example, if the written contract evokes a particular event or act (through the inclusion of multiple signature blocks and an “attorney consulted” provision) as the event most easily changeable, adjudicators may ignore the particular event, act, or context that was “least likely” and “thus most likely to have ‘made the difference’ between what happened and what could have happened.”<sup>140</sup> In the contracting context, the situational pressures of a particular situation may be the least likely factor (such as looming bankruptcy in the forbearance agreement context), which suggests that, at least through the use of the simulation heuristic, if the situational pressures had not been present, the contract would not have been executed or a particular party may be less blameworthy.<sup>141</sup> The written contract, as described above, may nevertheless obfuscate or ignore that fact.

### C. Contract Law Permits Extrinsic Evidence of Context

Existing contract law doctrine may also address some of the concerns outlined in this Article. Over time, contract law was modified by the rise of the unconscionability doctrine, which was intended to prevent, *inter alia*, the stronger contracting party from committing oral fraud and breaking their promises without recourse for the weaker party.<sup>142</sup> Similarly, duress

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139. Funder, *supra* note 3, at 82 (noting that at a minimum, “[t]he presuppositions, expectations, and even ‘biases’ that some social psychologists seemingly want to eliminate from the judgment process are the same things that researchers in AI [artificial intelligence] are finding necessary—but extremely difficult—to incorporate into that process”).

140. Feigenson, *supra* note 3, at 119–20.

141. Of course, understanding the situation does not necessarily mean excusing the act. *But see* John H. Harvey et. al., *How Fundamental is “The Fundamental Attribution Error”?*, 40 J. PERSONALITY & SOC. PSYCHOL. 346, 347 (1981) (discussing how “[t]he assignment of causality entails an interpretation of events, and this most often requires that one go beyond the information given in a particular situation. It is often the case that an event clearly does not have a unique (or comprehensible, in an ultimate sense) interpretation”).

142. Prentice, *supra* note 4, at 390. Prentice criticizes securities fraud case decisions that “roll back forty years of contract law reforms and again allow fraudsters to make promises, breach them, and do so with impunity.” *Id.*; Warkentine, *supra* note 8, at 480 (quoting U.C.C. § 2-302 cmt. 1 (2003)) (“An unconscionability analysis focuses on (1) the bargaining process leading to purported agreement to the terms (sometimes referred to as

may be an available defense to a contracting party if the context was sufficiently problematic.<sup>143</sup> These doctrines suggest a shift towards recognizing the relevance of evidence of “blameworthiness” and context outside of the written contract itself.<sup>144</sup> These exceptions thus may be a sufficient safeguard against the manipulation of *ex post* reaction to a contract context through the written contract itself.

Even under “evolved” contract law, however, the limited circumstances of duress or unconscionability have extremely high thresholds to overcome in order to rebut the presumption of enforceability of a contract where a manifestation of assent has been provided.<sup>145</sup> In the absence of a bad actor, in most cases the person creating the duress or procedural unconscionability (resulting in the unconscionable result), we are unaware of and do not appear to want to be aware of other relevant situational pressures.<sup>146</sup> In any event, the failure to recognize situational

‘procedural unconscionability’), and (2) the substantive ‘fairness’ of the disputed terms (‘substantive unconscionability’); Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 940 (2006) (“An unconscionable term or agreement must exhibit a lack of meaningful choice for the disadvantaged party (procedural unconscionability) and contain a burdensome or unfair term (substantive unconscionability) imposed on the disadvantaged party.”) (emphasis added).

143. BLACK’S LAW DICTIONARY 579 (9th ed. 2009) (defining duress as “a threat of harm made to compel a person to do something against his or her will or judgment; esp., a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition.”); FARNSWORTH, *supra* note 48 § 4.16 (describing duress as “[c]oercive behavior [in the] form of physical compulsion or of threat,” which, in the case of a threat, must be improper, induce assent, and be “sufficiently grave to justify the victim’s assent.”).

144. Similarly, exceptions to the parol evidence rule permit the introduction of evidence to demonstrate mistake, misrepresentation, or duress, even in the presence of an integrated written contract. Farnsworth, *supra* note 48, § 7.4.

145. Hanson & Yosifon, *supra* note 7, at 164 (noting that “only an extremely narrow range of situational factors count—those of dispositionally bad actors. . . . But these exceptions do not reveal a true sensitivity to situation; they expose only the tiny and predictable exception to dispositionism that proves the rule.”). We tend to see only salient actors as being a relevant situation (the “800-pound gorilla” that forces us to give up our seat) and otherwise ignore it. *Id.* at 165. In addition, the success rate for pleading unconscionability is low, even for those who (reluctantly) plead it. Morant, *supra* note 142, at 947.

146. Arthur Allen Leff described procedural unconscionability as “bargaining naughtiness.” Arthur Allen Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967). Hanson and Yosifon note that: “[e]ven in the exceptional, backwater doctrine of duress, the focus of contract law remains resolutely dispositionist—the will of the victim must be overcome in order for the doctrine to be implicated. And because we see most behavior as resulting from individual will, it is only the very palpable situational force of an unscrupulous person making a fear-inducing threat that can trump the presumption that it is an individual’s will in charge. Hanson & Yosifon,

pressures beyond “bad actors” or visible threats suggests that written contracts can be utilized to reinforce this failure.<sup>147</sup>

Beyond traditional criticisms of the shortcomings of the doctrines of unconscionability and duress, this Article suggests that our *ex post* adjudication is tainted in those situations that do not include intentional or knowing wrongdoing by the stronger contracting party. In particular, an examination of the adjudication of unconscionability would be relevant to this argument. In accordance with what attribution theory would suggest, one can view unconscionability as the adjudicator’s determination that a particular term is not fair or desirable based on the relative blameworthiness of the parties, presumably based, in part, upon the contract’s context. Even consent theorists resort to this when dealing with the limits of consent. For example, in the “click-through” Internet license agreements and other form contract agreements, Barnett suggests that the click is and should be a legally recognizable consent to be bound by all of those terms of the license agreement that may be reasonably expected.<sup>148</sup>

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*supra* note 10, at 14. The authors also note that even in those rare situations, it is primarily those individuals who are viewed by society as being unusually weak-willed who may be subject to such forces. *Id.*; *see, e.g.*, *Bell v. Koch Foods of Miss., LLC*, 358 Fed. App’x. 498, 503 (5th Cir. 2009) (noting that, in order to find procedural unconscionability, the “weaker party is prevented by market facts, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all”) (quoting *E. Ford, Inc. v. Taylor*, 826 So.2d 709, 716 (Miss. 2002)). Indeed, the lack of emphasis on procedural unconscionability can be attributed to our lack of desire or ability to grasp the situation. Morant, *supra* note 142, at 951 (citing cases that confirm his thesis that “common law decision-makers rely primarily on the substantive unconscionability of a case to justify relief to the disadvantaged party”). Morant concludes that “decision-makers who interpret the common law of contract should incorporate a realist’s perspective of power as they apply the doctrine of unconscionability.” *Id.* at 928.

147. *See* Hanson & Yosifon, *supra* note 7, at 302 (“[T]here are certainly many other features of our internal situations that can exercise as much influence over our conduct as does the more palpable situation of fear, yet those remain hidden by our dispositionism and are unseen in the law. Restricted by this dispositionist framework, the common law of contract has not developed categories of influence beyond salient external threats and internal fears through which parties can formulate their claims. Unless a choice can be shown to have been arbitrary, it is presumed to be the expression of an unfettered will.”). For example, the presentation of a contract in “plain English” may suggest the absence of procedural unconscionability, regardless of the effectiveness of such language. *See* cases cited *supra* note 101.

148. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 639 (2002) (“If I am right, parties who sign forms or click ‘I agree’ are manifesting their consent to be bound by the unread terms in the forms. They would rather run the risk of agreeing to unread terms than either (a) decline to agree or (b) read the terms. Refusing to enforce all of these terms would violate their freedom to contract. But parties who click ‘I agree’ are not realistically manifesting their assent to radically unexpected terms. Enforcing such an unread term would violate the parties’ freedom from contract.”) (emphasis omitted).

The *ex post* determination of “reasonable expectations,” however, is fraught with the same pitfalls of behavioral biases outlined in this Article because it essentially asks the adjudicator to assess the blameworthiness of the contracting actor as to what he or she should have reasonably expected.<sup>149</sup> In any event, the context suggesting what would have been reasonably expected is suddenly center stage, which, as we have seen, can be manipulated.

Moreover, the absence of a bright line for unconscionability may reveal too much for contract law theorists who prefer the bright line of an objective manifestation of assent. If there is a limit in their minds as to what counts as a manifestation of assent based on the situation, it needs to be clearly defined. Or, put another way, if there are contexts where subjective understanding is necessary (or where contractual freedom is lacking although necessary), such as what may be “reasonably expected” in a click-through license agreement, then why not describe those contexts clearly ahead of time? If it is not clearly defined, then we are asking the adjudicators to decide *ex post* based on some set of ambiguous factors whether the contract should be binding; and, in any event, their decision will be based at least in part upon a determination of the blameworthiness of the actors.<sup>150</sup> As discussed above, the factors they look to will logically

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Similarly, with respect to standardized agreements, the Restatement (Second) of Contracts § 211 suggests that the determination of whether a party agreed to contractual terms in a standardized contract depends on whether “similarly situated people (1) reasonably would have expected such a term to be included in that contract and (2) would have understood that the document was contractual in nature.” Warkentine, *supra* note 8, at 508. This approach recognizes the importance of the situation, but as Warkentine notes, it was not widely adopted except in certain insurance cases. *Id.* The UCC Article 2 did not contain a provision addressing consent to “unbargained-for terms” in standardized contracts, but revisions that would have utilized a “reasonable expectations” test were proposed for consumer form contracts. *Id.* at 510. These revisions were ultimately dropped in the final approved version of Article 2. *Id.*

149. *Id.* at 484 (noting that “[d]ecisions based on unconscionability are fact sensitive and, to a great extent, reflect trial judges’ subjective determinations. As a result, although there are now many cases that address unconscionability, they have little value as precedents”). Other judges may avoid the issue by focusing on an assent analysis instead of an unconscionability analysis. *Id.* at 520.

150. One author suggests, for purposes of determining procedural unconscionability (which implicates blameworthiness), a review of the following contextual factors: “[t]he advantaged party’s perceptions, beliefs, and biases related to the disadvantaged party. . . , the limited choices of the disadvantaged party,” and the “bargaining power of the respective parties with power defined as education, knowledge, and bargaining sophistication.” Morant, *supra* note 142, at 958; FARNSWORTH, *supra* note 48, §4.28 (listing numerous factors to be considered for purposes of ascertaining procedural unconscionability). Under Florida law, on the other hand, courts must look to:

- (1) the manner in which the contract was entered into; (2) the relative

include the appearance of the contract as well as its effect on the contracting party. Thus, we may be allowing the contract preparer to manipulate our perceptions *ex post* of whether the manifestation was freely given.

#### *D. The Limits of Situational Awareness*

Even if we desired to make adjudicators “aware” of the situational contract pressures and resist “contracting blame,” one could also argue that there is no assurance that adjudicators are able to perceive or process those pressures effectively.

In the process of determining the cause of behavior, people need to be made aware of situational pressures in order to be able to determine that such pressures contributed to a particular outcome.<sup>151</sup> As was seen in Section II *supra*, the design of many provisions of written contract appear to be designed to present an exclusive and one-sided view that there were no troubling situational pressures present at the time of contract execution. Indeed, even in the absence of such contractual provisions, people have difficulty imagining “the situation,” as it may not have physical attributes. After all, “[o]ne cannot see, smell, taste, or hear ‘audience pressure,’ which exists only in the mind of the public speaker.”<sup>152</sup> Similarly, in contract scenarios, it may be difficult for an adjudicator to envision all of the situational pressures present in the contract formation context.<sup>153</sup> It has been noted, for example, that sophisticated investors may be unlikely to examine or understand prospectuses because of the relationship that exists between the investor and the broker advising the investment, and this

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bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a ‘take-it-or-leave-it’ basis; and (4) the complaining party’s ability and opportunity to understand the disputed terms of the contract.

Tranchant v. Ritz Carlton Hotel Co., 2011 U.S. Dist. LEXIS 35099, at \*14 (M.D. Fla. Mar. 31, 2011) (quoting Pendergrast v. Sprint Nextel Corp., 592 F.3d 1119, 1135 (11th Cir. 2010)).

151. Gilbert & Malone, *supra* note 4, at 24.

152. *Id.* at 25. Gilbert summarizes that “it can be difficult to attain awareness of the forces that are compelling an actor’s behavior, and when observers lack such awareness they are predictably prone to correspondence bias [the fundamental attribution error].” *Id.*

153. It may be, however, that certain contracts do trigger memories or recognition of the situational pressures present. For example, in the rental car contract scenario, since many jurors presumably have rented a car before, they would presumably be aware of the situational pressures present. This does not diminish, however, a written contract’s attempt to promote a particular *ex post* conception of the contract context or diminish the adjudicator’s ability to discern the context.

relationship is obviously external to the written agreement.<sup>154</sup> Thus, making adjudicators aware of such a situation may prove to be difficult.

There also may be limits to the effectiveness of this awareness, as individuals still may be unable to determine accurately what a reasonable reaction to the situational pressures would be.<sup>155</sup> For example, people typically have inflated and unrealistic expectations of how others should have behaved in light of situational pressures if they rely on an inflated and unrealistic notion of how they would have behaved in the same situation.<sup>156</sup> One would expect the same sort of behavioral biases that affect people's decision-making process in the first place to play a role in this. While the optimism bias results in individuals underestimating the risk of a particular negative outcome when making a decision, the hindsight bias may cause that same individual to judge another more harshly.<sup>157</sup> In hindsight, we may believe that the risks should have been obvious to another and that we would have acted differently, while we, when acting and viewing a situation prospectively, may be subject to the same biases that affected the other in the same situation.<sup>158</sup> Moreover, encouraging adjudicators to think more broadly or deeply about a particular situation may not result in more accurate judgments because such individuals may focus on the "wrong" information.<sup>159</sup>

The existence and prevalence of the fundamental attribution error and

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154. Langevoort, *supra* note 30, at 631 (claiming "that once a broker successfully cultivates trust, willing reliance by the sophisticated investor—imprudent though it may seem in hindsight—is quite likely and, for that reason alone, worthy of some protection").

155. Hastie & Dawes, *supra* note 60, at 190 ("A person who attempts to understand everything can easily end up understanding nothing"); Gilbert & Malone, *supra* note 4, at 27 ("In short, people may incorrectly estimate the power of certain situations to induce certain behaviors.").

156. Gilbert & Malone, *supra* note 4, at 27. Gilbert and Malone discuss how an individual may use his or her "imagined response" in a particular situation to determine whether someone else, acting in the same situation, acted appropriately. This is "risky business," because individuals do not act uniformly *and* an individual's perception about how he or she would have acted in a particular situation is not always accurate. *Id.*

157. See Langevoort, *supra* note 30, at 672 (noting the "false consensus effect," whereby lawyers and judges assess reasonableness through the rose-colored lens of how they think they would behave under similar circumstances"). *But see* Hastie & Viscusi, *supra* note 76, at 916 (arguing that judges assess risk in hindsight better than juries).

158. Baron & Hershey, *supra* note 7, at 578 (suggesting that "people may confuse their evaluations of decisions with the evaluations of the consequences themselves").

159. Tetlock, *supra* note 6, at 466 ("Sometimes encouraging integrative complexity, far from debiasing judgment, may make matters worse."). Tetlock notes that merely incentivizing a more complicated approach to judgment did not make individuals "more discriminating consumers of the information at their disposal". *Id.* at 467; *see also* Harvey *supra* note 141, at 347 (noting that "[s]ituational biases and errors may be just as 'fundamental' as dispositional biases . . .").



related behavioral biases nevertheless suggest that dispositionist conclusions about the decision-maker cannot be avoided, regardless of whether relevant evidence exists.<sup>160</sup> If dispositionist conclusions will be made regardless of whether evidence is presented, then permitting inaccurate evidence (evidence in the contract suggesting a particular contracting context) might result in particular and troubling *ex post* conclusions about contracting parties.<sup>161</sup> At a minimum then, it is not clear that excluding evidence that presents a more accurate picture of the situation is logical or defensible based on the prevalence of the fundamental attribution error and related biases in judgment.<sup>162</sup>

*E. Written Contract as Practical and Promoter of Responsible Behavior*

Another justification for focusing on the context presented by the written contract (and ignoring situational influences such as oral representations or trust in the contracting parties' relationship) is that contract law can thereby provide a clear warning to contracting parties to "be wary and skeptical" of the contract preparer's behavior or relationship outside of the written contract.<sup>163</sup> The desirability of enabling particular

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160. Kamin & Rachlinski, *supra* note 75, at 92 (noting that "the hindsight bias has proven resistant to most debiasing techniques"); Park, *supra* note 3, at 740 ("Fundamental attribution error research indicates that human reasoners tend not only to make dispositional judgments freely, but also to overestimate the power of dispositions. But the legal policy implications are unclear because the research seems to show that humans will make dispositional attributions and overestimate the power of dispositions *whether or not* they are given relevant data about the history of the person whose disposition is being judged.").

161. See, e.g., Baron & Hershey, *supra* note 7, at 578 (suggesting the "[m]ere understanding that such confusion contaminates these evaluations is not enough to eliminate it"); Kamin & Rachlinski, *supra* note 75, at 102 (concluding that "[t]he ubiquity of foreseeability judgments in law suggests the need for developing effective debiasing techniques").

162. Baron & Hershey, *supra* note 7, at 578 (suggesting the usefulness of evaluating decisions "from the decision maker's viewpoint at the time of the decision, both for judging the decision maker and for promulgating standards for the future" in order to counteract the hindsight bias). Feigenson also discusses how attorneys, when attempting to diminish an adjudicator's perception of a particular actor's responsibility for an accident, can be expected to influence the adjudicator to identify with the particular actor. By identifying with a particular actor, the circumstances (the context) and other actors become more apparent, which suggests that someone or something else other than the actor's disposition will be blamed by the adjudicator. Feigenson, *supra* note 3, at 146-47. In the context of an accident, these evocations may not be accurate, but their employment and effectiveness may suggest that the attribution errors committed in light of a written contract can be counterbalanced by presentation of a more complete context.

163. Langevoort, *supra* note 30, at 684 (suggesting that "judges may be trying to channel behavior by creating an incentive to read" by finding a "duty to read" subscription

behavioral biases, such as the hindsight bias, may turn on whether the social actions promoted by an *ex post* review influenced by such biases are beneficial. For example, a rule protecting against the hindsight bias has been provided for business managers (the business judgment rule) and not for all professionals.<sup>164</sup> This may reflect our desire for:

lawyers or accountants t[o] guarantee their work with a system of de facto strict liability [that is, one that permits the influence of the hindsight bias], or take an occasional excess of precautions, but corporate managers operating under such a regime will be apt to betray the real interests of their shareholders.<sup>165</sup>

Similarly, in the contracting context, we may desire contracting parties to act with the knowledge that their contracting behavior will be reviewed with the full application of any hindsight bias, with the end result hopefully being that contracting parties act “non-negligently” in their own interests.<sup>166</sup>

If, however, strong situational pressures exist at the time of contracting, it may be very difficult for contracting parties *ex ante* to internalize such a legal message, such as when there is a strong or trusting relationship between the parties.<sup>167</sup> Obvious differences between professionals and ordinary contracting parties will also exist in many instances, which suggests that the harsher regime enabling the hindsight bias should not necessarily be promoted when less sophisticated parties (or parties relying on fiduciary or similar relationships) are involved.<sup>168</sup> In any event, the more pressing issue is whether the situational pressures can be recognized *ex post* and if such recognition can be skewed through contractual preparation. Thus, although we may still want to ask whether

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agreements, which may preclude fraud claims).

164. Rachlinski, *supra* note 76, at 622.

165. *Id.* at 623.

166. Tetlock, *supra* note 6, at 468 (arguing that the fundamental attribution error may be a positive normative outcome if we would like to hold others strictly accountable for their behavior, as “[o]ne way of pressuring other people to behave is by indicating to them that one has a low tolerance for justifications or excuses and that one will treat their behavior as automatically diagnostic of underlying intentions”). It also may be argued that a contract exists in part to avoid the hindsight bias being applied against the contract preparer, who may be the party with the most power, control, and sophistication, which could in hindsight suggest that the contract preparer should be “more” liable in any particular loss situation.

167. Langevoort, *supra* note 30, at 672 (noting in the investor context that where “extensive trust [the situational pressure] is common and predictable, however, it would take an unusually strong and clear legal message to dissuade investors from relying *ex ante* [on that trust]”).

168. Bainbridge, *supra* note 77, at 1042–43 (suggesting that “habits” as decision-making heuristics can lead to “suboptimal decisions in particular circumstances,” which means that “legal intervention” should be evaluated based on whether those “habits” are “rational rather than myopic”).

the exclusion of situational evidence is preferable to its inclusion in terms of efficiency, we should also consider whether the exclusion of situational evidence distorts the adjudicator's perspective. Obviously, the effectiveness of a particular doctrine or reform in promoting "efficient" behavior is a valid consideration in support of the doctrine or reform, but that does not necessarily mean that the effect of the doctrine or reform upon an adjudicator's ability to discern the situational context accurately should be ignored. Indeed, if a reform promotes efficient behavior but does not appear to do so from an adjudicator's perspective, then the reform's effectiveness may be blunted. Conversely, if a reform (such as plain English) does not promote efficient behavior but does appear to do so from an adjudicator's perspective, then the reform's effectiveness will be overstated.

#### IV. IMPLICATIONS AND SUGGESTIONS FOR CONTRACT LAW

This Article suggests an alternative explanation for the existence and prevalence of particular contract provisions, one that should be troubling for both traditional contract law theorists as well as "situationists." The alternative explanation, while difficult to decouple from the more "virtuous" explanation of contract where parties do in fact set forth their exclusive and exhaustive stipulations of terms (including contextual terms), is both plausible and probable.<sup>169</sup> At a minimum, a more complete and compelling response to the alternative explanation offered in this Article is warranted.<sup>170</sup> If, for example, *ex post* perceptions of the voluntariness of assent, which is fundamental to contract legal doctrine, can be manipulated *ex ante* by contract preparers, then contract law theories need to be able to justify such manipulation or admit such manipulations as a weakness

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169. This is particularly true if the context of a contract is as important as some believe. Hanson & Yosifon, *supra* note 7, at 302-03 ("[I]f the situation was as profoundly recognized in our laws as it is influential in our lives, the role of the situation would be presumptively paramount, rather than presumptively irrelevant.").

170. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1487-88 (1998) (suggesting that, although conventional economics explanations often have "the advantage of simplicity and parsimony," they also often do so "at the expense of any real predictive power."). Jolls, Sunstein and Thaler also note "[i]t is not even clear that there are steady or stable background preferences that might be 'informed.' The preferences can themselves be an artifact of the method of informing." *Id.* at 1535. Indeed, "[i]f, as the evidence suggests, preferences are unstable, constructed, and manipulable, this should give rise to concern about the legitimacy of our systems . . . . Hiding our heads as a defense tactic succeeds only when the danger is just in our heads." Hanson & Yosifon, *supra* note 7, at 188.

within the current state of contract law.<sup>171</sup> Moreover, such justifications cannot rely on the subjective intent of the parties to create such an *ex post* perception because, empirically, in many situations, the contracting party that did not prepare the contract simply *had no such intent*. This has obvious implications for the contract law doctrine, but one should also not overlook the impact of “blameworthiness” with respect to adjudicative outcomes as well. To the extent that our reactions regarding blameworthiness can be anticipated and manipulated, our conclusions regarding the application of contract doctrine are affected as well.

One of the related critiques of behavioral explanations of law is that institutional reforms proposed based on judgment biases may not take into account institutional limitations.<sup>172</sup> If a broader contextual review of contracts will be permitted or tolerated, for example, it should be based on carefully considered empirical evidence that such a review would actually result in “better” adjudication, of which none is offered here.<sup>173</sup> In addition, any reforms proposed that would put additional decision-making authority in the hands of others, such as creating and monitoring standards regarding the inclusion of additional contextual contract evidence (besides the written contract), would rely on individuals who also may be subject to the same cognitive judgment limitations.<sup>174</sup> It therefore is not necessarily desirable

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171. *See id.* at 187 (“In most circumstances, we should recognize we are stuck with trade-offs, proceed with a sensible discussion of what we value, and then set a decision threshold accordingly”) (citation omitted). Hastie and Dawes suggest “thinking harder about values, rather than accuracy,” and any associated “difficulties must not divert us from trying to think harder, more systematically, and from multiple perspectives about the unavoidable trade-offs.” *Id.* at 187–88; *see also* Jolls, Sunstein, & Thaler, *supra* note 170, at 1489 (suggesting that a “behavioral approach imposes discipline on economic theorizing because assumptions cannot be imported at will”).

172. Issacharoff, *supra* note 75, at 1743 (“[T]he behavioral model’s focus on the individual actor has not yet successfully grappled with the complex institutional settings through which law operates.”). Issacharoff goes on to critique proffered solutions in other contexts to the effect of behavioral biases and judgment heuristics that lack evidence of effectiveness. *Id.* at 1743–45; *see also* Langevoort, *supra* note 30, at 701 (“Both judicial and regulator policy can readily suffer from their own self-serving influence and illusion of control, overestimating the likely benefit to flow from their chosen regulatory strategies, underestimating their costs.”); Bainbridge, *supra* note 77, at 1059 (“Behavioral economics itself offers additional reasons to doubt the capacity of the law as agent for social change.”).

173. *See* Bainbridge, *supra* note 77, at 1028 (arguing that behavioral economics’ “limits and [] liberty implications suggest that it also is a tool that needs to be used thoughtfully and cautiously”); Sophie Roell, *Jonah Lehrer on Decision-Making*, THE BROWSER, available at <http://thebrowser.com/interviews/jonah-lehrer-on-decision-making> (suggesting that the pivotal question is how we will turn “behavioral economics into an applied science”) (last visited Nov. 18, 2012).

174. Issacharoff, *supra* note 75, at 1745 (suggesting that “[b]ounded rationality should not become the pretext for the imposition of an overarching regulatory structure on individuals . . . . [T]here is precious little evidence that even professional bodies are immune

to promote policies that remove or diminish either of the parties to a contract as the decision-maker.<sup>175</sup>

Nevertheless, “to acknowledge situation is not to surrender to it, but rather it is to take a necessary step in gaining some control over it.”<sup>176</sup> Accordingly, this Article does not suggest the replacement of individual autonomy with respect to contracts nor solutions designed without empirical support.<sup>177</sup> Instead, as described below, contract law reforms should recognize the broader contractual context and the implications of contextual clues within the written contract for adjudicators in addition to the contracting parties themselves.

One minimalist suggestion in this Article is that contract law reforms, when proffered, should be scrutinized for their likely effect not only on the contracting parties but also upon the *ex post* adjudicators examining the contracts.<sup>178</sup> If a reform can be seen as portraying an inaccurate picture of the contracting context or otherwise inaccurately or improperly reinforcing a particular depiction of the contracting context, then such a fact should be

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from the same biases evident in individual decision making”); Park, *supra* note 3, at 739 (suggesting that “[t]here is certainly no guarantee that a judge will be immune from attribution error in making decisions, including a decision about what might prejudice the jury whose voir dire the judge has supervised”).

175. Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1225 (2003) (“Paternalistic constraints on choice cannot be justified with psychology absent a showing that the costs of privately developing better ways to make choices are greater than the costs of restricting individual choice.”); *see, e.g.*, Zacks, *supra* note 36, at 1503 (advocating reforms that do not “supplant the Holder [the contracting party that did not prepare the contract] as the ultimate decisionmaker” but instead those that are focused on “tempering Holder behavioral biases while at the same time limiting Issuer’s [the contract preparer’s] unilateral contracting power.”).

176. Hanson & Yosifon, *supra* note 10, at 175. However, “[g]iven the importance of consent as a basis for contract enforcement, intervention has greater legitimacy if the disadvantaged party’s assent to an onerous term is doubtful . . . . Protection of disadvantaged parties who are victims of opportunistic abuses of power morally justifies measured intervention.” Morant, *supra* note 142, at 938. This Article has asserted that our ability to divine assent can be and is manipulated through the written contract itself, which has implications for our perceptions of the actors and their blameworthiness.

177. *See, e.g.*, Hastie & Dawes, *supra* note 60, at 334 (suggesting that “like Benjamin Franklin, we have not tried to tell you what to decide, but rather how to decide”).

178. *See* Hastie & Dawes, *supra* note 60, at 187 (“In most circumstances, we should recognize we are stuck with trade-offs, proceed with a sensible discussion of what we value, and then set a decision threshold accordingly.”). Hastie and Dawes suggest “thinking harder about values, rather than accuracy,” and any associated “difficulties must not divert us from trying to think harder, more systematically, and from multiple perspectives about the unavoidable trade-offs.” *Id.* at 187–88; *see also* Jolls, Sunstein, & Thaler, *supra* note 170, at 1489 (suggesting that a “behavioral approach imposes discipline on economic theorizing because assumptions cannot be imported at will”).

weighed against the positive aspects of the reforms.<sup>179</sup> Such an approach would certainly muddy the waters of contract law reform, but again, simplicity and predictability should not necessarily be promoted above serving other goals of contract law, such as promoting the outcomes desired by the contracting parties. If we can contemplate that contractual situations are perhaps more complicated than “I acted, therefore I consented to the contract,” then we should correspondingly expect to be forced to examine proffered reforms more closely. When contemplating a reform, one should consider the possible responses of the repeat player in the contract preparation context as well as the possible adjudicator response to a written contract that includes the contemplated reform.

For example, one reform offered in the past and discussed in this Article is to require certain types of contracts to be written in “plain English.”<sup>180</sup> When examining such a reform, one should consider whether the adjudicators examining a contract written in plain English are likely to be prejudiced improperly by such a presentation. If, as is suspected, adjudicators tend to blame the victim and seek evidence reinforcing this belief, then the presentation of a contract in plain English may serve as reinforcement that the victim could and should have acted otherwise (and presumably, that the adjudicator would have acted otherwise to avoid facing the conclusion that such a poor outcome could have happened to him or her).<sup>181</sup> This may be amplified by the hindsight bias, causing the poor outcome to be perceived as being easier to predict with the aid of hindsight in addition to the plain English presentation of the contract. The

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179. See Jolls, Sunstein, & Thaler, *supra* note 170, at 1489 (suggesting that “assumptions about behavior should accord with empirically validated descriptions of actual behavior.”); see also Hastie & Dawes, *supra* note 60, at 160 (suggesting that “judgments are likely to be more accurate if the judge can step back, take an outside view, and thinking distributionally and probabilistically, even if the thought process is only qualitative”). Hastie and Dawes warn against “judging intuitively” because “the mind is drawn to a limited, systematically skewed subset of the possible events.” *Id.* at 159. This, of course, would be a departure from the dispositionist approach of current legal judgment, which presumes and reinforces a belief in the voluntariness of most acts.

180. David M. LaPrairie, *Taking the “Plain Language” Movement Too Far: The Michigan Legislature’s Unnecessary Application of the Plain Language Doctrine to Consumer Contracts*, 45 WAYNE L. REV. 1927, 1930–33 (2000) (discussing various state approaches to the “plain language doctrine”).

181. See Langevoort, *supra* note 30, at 671 (noting that “[o]ne premise of many anti-protectionist perspectives is that the usual ‘sophisticated’ investor is—and should be—wary and vigilant in sales interactions. . . . Consequently, absent some evidence of incapacity or duress (at which point they will simply be declared unsophisticated), fairness dictates no more protection for the sophisticated investor than the minimal ‘rules of the game’ to guide the process of arm’s length bargaining.”). Presumably, presentation of a contract in plain English would satisfy and reinforce this belief, for a “sophisticated” investor should be expected to be able to read and understand such a written presentation.

initial presentation of the contract in plain English may also create a particular first impression upon the adjudicator, one that may be resistant to change.<sup>182</sup> These effects on adjudicators may not be outweighed by any supposed benefit by the plain English to the contracting party, particularly if it can be shown that such contracts are not read or understood regardless of presentation.<sup>183</sup>

As a corollary, one should expect less resistance by contract preparers to additional contract reforms that seek to modify the contracting context *within the contract itself*, such as reforms to promote plain English. If, indeed, such reforms are largely ineffective *ex ante* but *ex post* may promote adjudicator judgment biases, these reforms should be welcomed by the parties who routinely prepare contracts.<sup>184</sup>

182. Hastie & Dawes, *supra* note 60, 32–33 (discussing the primacy effect). This may be amplified by Reid and Dawes' general conclusion that expert individuals making judgments generally rely on "relatively few cues," use a judgment process that is self-reinforcing and that does not filter related but irrelevant information very well. *Id.* at 52–53 n.1.

183. See Leff, *supra* note 1, at 157 (noting that "some people would sign a contract even if 'THIS IS A SWINDLE' were embossed across its top in electric pink."); Meyerson, *supra* note 9, at 612–13 (arguing that "[m]erely using a contract with plain language . . . is not sufficient, even though such a contract would somewhat decrease the consumer's information costs"). But see Tim Loughran & Bill McDonald, *Plain English, Readability, and 10-K Filings* 29, (Aug. 4, 2009), available at [http://www.nd.edu/~tloughra/Plain\\_English.pdf](http://www.nd.edu/~tloughra/Plain_English.pdf) (finding that "[t]he second question addresses whether the enhanced readability in 10-Ks led to different behavior by investors and managers. In this setting, we find strong evidence that behavior changed. Improved readability affected the trading patterns of 'average' investors and the probability of managers issuing seasoned equity.").

184. See, e.g., Letter from Am. Bankers Ass'n (May 27, 2011), available at <http://www.aba.com/aba/documents/news/DraftForms6111.pdf> (letter and comments on proposed mortgage reform suggesting that "[t]he draft mortgage forms set forth clearer and more comprehensible disclosures that will better serve consumers. ABA believes these forms provide an excellent base to advance toward meaningful reform of the existing mortgage disclosure process."); E-mail from Bianca A. Russo, Managing Dir., J.P. Morgan Chase & Co., to Elizabeth M. Murphy, Sec'y, Sec. Exch. Comm'n 2 (Aug. 2, 2010), available at <http://www.sec.gov/comments/s7-08-10/s70810-110.pdf> (stating "JPMorgan Chase strongly supports the public policy goals of improving disclosure and transparency in this market and agrees that such improvements are necessary in order to bring the securitization markets back to full health," although it did criticize particular reforms); Letter from Jim Pair, President, Nat'l Ass'n of Mortg. Brokers 24 (Dec. 24, 2009), available at <https://www.namb.org/images/namb/GovernmentAffairs/2009-12-24%20-%20NAMB%20Comments%20on%202009%20TILA%20Proposed%20Rule.pdf> (outlining critiques regarding particular disclosure techniques, although, "NAMB supports efforts to provide clearer and more conspicuous consumer disclosures."); Letter from Paul Schott Stevens, Senior Vice President, Inv. Co. Inst., to Jonathan G. Katz, Sec'y, Sec. Exch. Comm'n (Mar. 24, 1997), available at [http://www.ici.org/policy/comments/ci.97\\_SEC\\_PLAIN\\_ENGL\\_COM.print](http://www.ici.org/policy/comments/ci.97_SEC_PLAIN_ENGL_COM.print).

## CONCLUSION

Evolving contract law reforms are provocative in that they evince a public concern, if narrow and incomplete, about the “situation” of contracting. If we care about contracts being in plain English or providing meaningful disclosure to the contracting party, it suggests we are concerned about objective manifestations of assent that occur outside of a “proper” context.<sup>185</sup> The issue to date, however, is that reforms appear to be ineffective in modifying the actual contracting situation while reinforcing existing adjudicative biases.<sup>186</sup> This, in turn, precludes a deeper and more accurate examination of the contracting context.<sup>187</sup> If we are comfortable with reforms that make us feel better after the fact about the contracting context (regardless of effectiveness), then we are unlikely to search for evidence that the context was not as depicted by the contract’s content and presentation.

Just as it may be relevant in certain contexts that one party has not read or attempted to negotiate the contract at all, it also should be relevant that the contract will be presented to, and read by, the adjudicator (who is similarly subject to decision-making biases). The contracting context, as it exists for the contracting parties as well as how it is presented to

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185. See, e.g., Langevoort, *supra* note 30, at 627 (arguing for “meaningful risk disclosure requirements even when the investor is sophisticated”).

186. Proffered reforms continue to include formatting and disclosure revisions. See, e.g., Warkentine, *supra* note 8, at 546 (suggesting that a “knowing assent” requirement for contracts could be achieved through “bold-faced, extra-large print” disclosure of material terms); see also the discussion of plain English reform described in Section II.E *supra*. These reforms, as described above, likely fail to address the underlying situation of contracting parties.

187. See, e.g., Kimberley Ayer, *Striking a Balance: When to Extend the Right to Rescind Under TILA*, 85 ST. JOHN’S L. REV. 261, 279–80 (2011) (noting that compliance with mortgage disclosure statutes did not necessarily protect borrowers, as “[l]enders targeted potential borrowers that they thought they could convince to take on a subprime loan—people who were relatively unsophisticated and uneducated, who were unlikely to read and understand the paperwork accompanying the transaction, and who would not understand enough about subprime loans to realize that they simply could not afford to take on that kind of financial risk.”); Bainbridge, *supra* note 77, at 1054 (suggesting that “[i]f one wants to prevent issuers from taking advantage of cognitive errors by investors, the appropriate place to do so is in the anti-fraud regime not the disclosure regime.”); MacDonald, *supra* note 36, at 89 (“Three decades ago, a consumer could close a mortgage with about 5 to 10 pages of documents. Today it takes almost 200 in most parts of the country. . . . At the rate disclosure laws are being enacted, in ten years it will take 300 pages to close a mortgage and 50 or more to open a card account.”). But see Morant, *supra* note 142, at 959 (suggesting that “[b]roadening review of preformation and contextual factors, particularly within unconscionability’s procedure element, confirms the reality of assent, as well as the need to relieve the disadvantaged party of her obligation to perform onerous terms of the bargain”).



adjudicators, needs to be contemplated beyond the words of the written contract.<sup>188</sup> The adjudicators' related assessments of blameworthiness, in part based on the presentation and formatting of the contract, have important implications for contract law doctrine and reforms. This Article suggests that until we develop a more complete and nuanced understanding of the contracting context and its adjudicative effect as presented in, and manipulated by, the written contract, contract law reforms may be more effective at achieving a one-sided, if inaccurate, *ex post* perception of the contracting context instead of substantively achieving the desired reforms.

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188. Hastie & Dawes, *supra* note 60, at 334 (“When people deliberately scrutinize their decisions, they are able to identify and correct their own biases and inconsistencies.”); see Morant, *supra* note 142, at 956, 960 (arguing that those “who interpret the common law of contracts can, and should, more probingly evaluate the dynamic of power” and examine, at least for fairness purposes, “the full context of the parties’ bargain” within binding contracts, which would include “the influences of attitudinal biases, power disparities, and opportunism”).